No. 18-457

# In The
# Supreme Court of the United States

NORTH CAROLINA DEPARTMENT OF REVENUE,

*Petitioner,*

v.

THE KIMBERLEY RICE KAESTNER
1992 FAMILY TRUST,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of North Carolina**

## JOINT APPENDIX


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**Petition For A Writ Of Certiorari Filed October 9, 2018**
**Certiorari Granted January 11, 2019**

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**The Kimberly Rice Kaestner Trust VS N.C. Dep't of Revenue**
Case Number:
**2012CVS8740**

Case County:
**WAKE**

Judge:
**Gregory P. McGuire**

| | | | |
|---|---|---|---|
| 1 | 06/20/2012 | (1) Complaint | Complaint by Plaintiff: The Kimberley Rice Kaestner Trust |
| 11 | 09/07/2012 | (11) Brief in Support (except Summary Jmnt Motion) | Defendant's Motion to Dismiss & Brief in Support of Motion to Dismiss by Defendant:N.C. Dept of Revenue |
| 15 | 10/31/2012 | (15) Other Brief | Response in Opposition to Motion to Dismiss by Plaintiff:The Kimberly Rice Kaestner Trust |
| 17 | 11/13/2012 | (17) Brief in Support (except Summary Jmnt Motion) | Defendant's Reply Brief In Support of Motion to Dismiss by Defendant:N.C. Dept of Revenue |
| 21 | 02/11/2013 | (21) Order and Opinion | Opinion and Order on Defendant's MTD by Court:Court |

| | | | |
|---|---|---|---|
| 24 | 06/13/2013 | (24) Answer to Complaint | Answer by Defendant:N.C. Dept of Revenue |
| 37 | 07/02/2014 | (37) Motion for Summary Judgment | Plaintiffs Motion for Summary Judgment by Plaintiff:The Kimberly Rice Kaestner Trust |
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| 50 | 10/01/2014 | (50) Other Brief | Response in Opposition to Def.'s Motion for SJ and Reply in Support of Pl.'s Motion for SJ by Plaintiff:The Kimberly Rice Kaestner Trust |

| | | | |
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| 51 | 10/14/2014 | (51) Other Motion | Defendant's Reply to Plaintiff's Response and Reply to Motions for Summary Judgment by Defendant:N.C. Dep't of Revenue |
| 54 | 04/23/2015 | (54) Order and Opinion | Opinion and Order on Motions for Summary Judgment by Court:Court |
| 55 | 05/21/2015 | (55) Motion to Stay | Motion to Stay by Defendant:N.C. Dept of Revenue |
| 56 | 05/22/2015 | (56) Notice of Appeal | Notice of Appeal by Defendant:N.C. Dep't of Revenue |
| 57 | 06/01/2015 | (57) Order | Order on Motion to Stay by Court:Court |

**Relevant Docket Entries of the North Carolina Court of Appeals**

**Docket Sheet**

**The Kimberley Rice Kaestner 1992 Fam. Tr. v. NC Dept. of Revenue**

**Case Number:** 15-896

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1 – RECORD
Filed: 08-12-2015 @ 03:46:00
FOR: Defendant-Appellant North Carolina Department of Revenue
BY : Ms. Peggy S. Vincent
N.C. DEPARTMENT OF JUSTICE

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3 – APPELLANT BRIEF
Filed: 10-14-2015 @ 16:54:32
FOR: Defendant-Appellant North Carolina Department of Revenue
BY : Ms. Peggy S. Vincent
N.C. DEPARTMENT OF JUSTICE

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6 – APPELLEE BRIEF
Filed: 12-16-2015 @ 19:42:32
FOR: Plaintiff-Appellee The Kimberley Rice Kaestner 1992 Family Trust
BY : Mr. Thomas D. Myrick
MOORE & VAN ALLEN

8 – APPELLANT BRIEF
Filed: 01-14-2016 @ 17:47:08
FOR: Defendant-Appellant North Carolina Department of Revenue
BY : Ms. Peggy S. Vincent
N.C. DEPARTMENT OF JUSTICE

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**SUPREME COURT OF NORTH CAROLINA**

**Docket Sheet**

**The Kimberley Rice Kaestner 1992 Family Trust v N.C. Department of Revenue**

**Case Number:** 307PA15-2

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1 – APPLICATION FOR TEMPORARY STAY
(Allowed) – 07-25-2016
Filed: 07-22-2016 @ 16:26:27
FOR: Defendant-Appellant North Carolina Department of Revenue
BY :Ms. Peggy S. Vincent
N.C. DEPARTMENT OF JUSTICE

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2 – PETITION FOR WRIT OF SUPERSEDEAS
(Allowed) – 12-08-2016
Filed: 07-22-2016 @ 16:18:25
FOR: Defendant-Appellant North Carolina Department of Revenue
BY : Ms. Peggy S. Vincent
N.C. DEPARTMENT OF JUSTICE

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4 – PETITION FOR DISCRETIONARY REVIEW
(Allowed) – 12-08-2016
Filed: 08-09-2016 @ 10:44:34
FOR: Defendant-Appellant North Carolina Department of Revenue
BY : Ms. Peggy S. Vincent
N.C. DEPARTMENT OF JUSTICE

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7 – APPELLANT BRIEF
Filed: 03-09-2017 @ 11:42:44
FOR: Defendant-Appellant North Carolina Department of Revenue
BY : Mr. Matthew W. Sawchak
N.C. DEPARTMENT OF JUSTICE

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10 – APPELLEE BRIEF
Filed: 06-12-2017 @ 22:54:37
FOR: Plaintiff-Appellee The Kimberley Rice Kaestner 1992 Family Trust
BY : Mr. Thomas D. Myrick
MOORE & VAN ALLEN

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12 – APPELLANT BRIEF
Filed: 07-13-2017 @ 15:21:53
FOR: Defendant-Appellant North Carolina Department of Revenue
BY : Mr. Matthew W. Sawchak
N.C. DEPARTMENT OF JUSTICE

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|---|---|
| STATE OF NORTH CAROLINA<br>COUNTY OF WAKE | IN THE<br>GENERAL COURT<br>OF JUSTICE<br>SUPERIOR COURT<br>DIVISION<br>12-CVS-_____ |
| THE KIMBERLY RICE KAESTNER 1992 TRUST,<br>Plaintiff,<br>v.<br>NORTH CAROLINA DEPARTMENT OF REVENUE,<br>Defendant | **COMPLAINT**<br>(Filed Jun. 21, 2012) |

Plaintiff, the Kimberly Rice Kaestner 1992 Trust, asserts a complaint against Defendant, the NC Department of Revenue, pursuant to Sections 105-241.17 of the North Carolina General Statutes, and alleges as follows:

## SUMMARY OF CLAMS

1. Plaintiff has been forced to pay an unconstitutional tax to the State of North Carolina based solely on the fact that a beneficiary is a resident of the State.

2. Section 105-160.2 of the North Carolina General Statutes imposes a tax on trusts "computed on the amount of the taxable income of the estate or trust that is for the benefit of a resident of this State. . . ." "The

tax computed under the provisions of this Part shall be paid by the fiduciary responsible for administering the estate or trust" *Id.*

3. Plaintiff requested a refund for taxes paid pursuant to Section 105-1602 for the 2005 through 2008 tax periods.

4. Defendant denied Plaintiff's refund request because Plaintiff has a beneficiary who is a North Carolina resident.

5. Section 105-160.2 is unconstitutional on its face and as applied to Plaintiff.

6. Section 105-160.2 violates the United States Constitution because, *inter alia*, it is inconsistent with the due process clause of the Fourteenth Amendment ("Due Process Clause") and the commerce clause found in Article I, § 8, cl. 3 of the United States Constitution. ("Commerce Clause").

7. Section 105-160.2 also violates the North Carolina Constitution because, *inter alia*, it is inconsistent with Section 19 of Article I.

## PARTIES

8. Plaintiff is a trust with a situs in New York.

9. Defendant is charged with the administration of tax laws and regulations for the State. Defendant has been, is currently, and will be acting under color of authority and law of the state.

## JURISDICTION AND VENUE

10. The Office of Administrative Hearings dismissed Plaintiff's petition because Plaintiff is challenging the constitutionality of a North Carolina tax statute. As a result, this Court has jurisdiction over this action and is the only proper venue. *See* N.C. GEN. STAT. § 105-241.17. Attached as Exhibit A is a copy of the Office of Administrative Hearings Final Decision Order of Dismissal, filed August 22, 2011.

## FACTUAL BACKGROUND

11. The Joseph Lee Rice, III Family 1992 Trust (the "Trust") was created under agreement (the "Trust Agreement") dated December 30, 1992 between Joseph Lee Rice III as Settlor (the "Settlor") and William B. Matteson as Trustee (the "Initial Trustee").

12. On the date of the Trust's creation, the primary beneficiaries of the Trust were the Settlor's descendants, none of whom were residents or domiciliaries of North Carolina.

13. On the date of the Trust's creation, both the Settlor and the Initial Trustee were residents and domiciliaries of New York and the Trust was subject to New York income tax.

14. On the date of the Trust's creation, the Trust was a separate tax paying entity, and it continues to be such an entity.

15. The Trust Agreement recites that New York law governs the Trust.

16. In 1995, the Initial Trustee moved to Florida.

17. On December 30, 2002, pursuant to Section 1.2 of the Trust Agreement, the Trust was divided into separate share trusts; one for each of the Settlor's three children, Kimberly Rice Kaestner (formerly Kimberly E. Rice), Daniel Rice and Lee Rice. Kimberly Rice Kaestner was a resident and domiciliary of North Carolina at that time, having moved to North Carolina in 1997.

18. The current beneficiaries of the separate share trust for the benefit of Kimberly Rice Kaestner (i.e., Plaintiff) are Kimberly Rice Kaestner and her three children, all of whom were residents and domiciliaries of North Carolina in the 2005, 2006, 2007 and 2008 tax years.

19. The contingent remainder beneficiaries of the Trust are Daniel Rice (a resident and domiciliary of Virginia), Lee Rice (a resident and domiciliary of New York), the Settlor's Spouse, Franci Blassberg (a resident and domiciliary of New York), and the Settlor's sister, Jere Anne Vockins (a resident and domiciliary of Connecticut).

20. On December 21, 2005 the Initial Trustee resigned as trustee of the Trust (and of each of its separate share trusts including Plaintiff) and the Settlor appointed David Bernstein, who was then and has

continued since then to be a Connecticut resident and domiciliary, as successor Trustee.

21. Between 2005 and 2008, the assets held in Plaintiff consisted of equities, mutual funds and investments in partnerships.

22. Plaintiff filed Form D-407 "Estates and Trusts Income Tax Return" with Defendant in 2005, 2006, 2007 and 2008 and paid the tax allegedly due to North Carolina in full on the income accumulated by Plaintiff and not distributed.

23. From the Trust's creation through and including the 2008 tax period, no distributions were ever made to a North Carolina beneficiary.

**PROCEDURAL BACKGROUND**

24. Plaintiff filed a claim for a refund of taxes with Defendant for all tax paid for the 2005, 2006, and 2007 tax periods on September 9, 2009, and for the 2008 tax period on October 21, 2009, on the basis that Section 105-160.2 is unconstitutional because, *inter alia*, it violates the Due Process Clause and the Commerce Clause of the U.S. Constitution and Section 19 of Article I of the Constitution of the State of North Carolina.

25. Plaintiff sought refunds for these tax periods in the following amounts:

(a) Tax Period 2005: $79,634.00

(b) Tax Period 2006: $106,637.00

(c) Tax Period 2007: $1,099,660.00

(d) Tax Period 2008: $17,241.00

26. On April 15, 2010, Defendant served Plaintiff with a Notice of Proposed Denial of Refund for the 2005, 2006 and 2007 tax periods.

27. For the 2008 tax period, Defendant is deemed to have denied Plaintiff's refund request on April 21, 2010 because Defendant did not take one of the actions listed in Section 105-241.7(c) within six months of the filing of the claim for refund of taxes.

28. On May 12, 2010, Plaintiff filed an Objection and Request for Departmental Review for tax years 2005, 2006, 2007 and 2008.

29. On December 14, 2010, Plaintiff's representatives and Defendant had a telephone conference as required by Section 105-241.13(b).

30. On February 11, 2011, Defendant served Plaintiff with a Notice of Final Determination for tax years 2005, 2006, 2007 and 2008 (the "Final Determination").

31. The Final Determination states the following as the basis for the Defendant's denial of the Plaintiff's claim for a refund:

> In the California case, *McCulloch v. Franchise Tax Board*, 61 Cal. 2d. 186, 390 P.2d 412 (1964), it was found that the state of the trust beneficiary's residence may properly tax the trust on income payable in the future to the

> beneficiary. Although the income is retained by the trust, the state provides protection incident to the beneficiary's eventual enjoyment of accumulated income. As an official of the executive branch of government, the Secretary of Revenue lacks the authority to determine the constitutionality of legislative acts. The Department has determined that the denial of taxpayer's claim for refund is in accordance with North Carolina statutes and case law and is therefore correct.

32. Plaintiff commenced a contested case before the Office of Administrative Hearings on March 28, 2011.

33. On May 2, 2011, Defendant moved to dismiss the contested case for lack of jurisdiction.

34. On August 22, 2011, the Office of Administrative Hearings granted Defendant's motion and dismissed the contested case petition for lack of jurisdiction because the sole issue was the constitutionality of a statute.

35. In Compliance with N.C.G.S. § 105-241.17, Plaintiff commences this action within two years of the dismissal by the Office of Administrative Hearings and there are no taxes, penalties or interest outstanding.

**FIRST CLAIM FOR RELIEF**
**(Violation of the Due Process Clause of the U.S. Constitution)**

36. The allegations of paragraphs 1 through 35 are incorporated herein by reference.

37. Defendant improperly assessed taxes against Plaintiff because Plaintiff does not have minimum contacts with the State of North Carolina:

(a) the trustees were never residents of North Carolina;

(b) the situs of the trust is located outside of North Carolina;

(c) the trust property is located outside of North Carolina;

(d) assets of the trust upon which tax has been assessed have not been distributed to any beneficiary inside North Carolina; and

(e) the Settlor was never a resident of North Carolina.

38. Plaintiff has done nothing to avail itself of the benefits and protections of North Carolina.

39. Defendant's improper assessments deprived Plaintiff of property.

40. Therefore, Section 105-160.2 and its application to Plaintiff are unconstitutional.

**SECOND CLAIM FOR RELIEF**
**(Violation of the Commerce Clause of the U.S. Constitution)**

41. The allegations of paragraphs 1 through 40 are incorporated herein by reference.

42. Defendant improperly assessed taxes against Plaintiff because the assessed taxes pursuant to 105-160.2 violate the commerce clause in that:

(a) the tax is not applied to an activity with a substantial nexus with the taxing state;

(b) the tax is not fairly apportioned among all jurisdictions with which the activity has a nexus;

(c) the tax discriminates against interstate commerce; and

(d) the tax is not fair relative to the services provided by the State.

43. There are no minimum contacts between Plaintiff and the State of North Carolina because:

(a) the trustees were never residents of North Carolina;

(b) the situs of the trust is located outside of North Carolina;

(c) the trust property is located outside of North Carolina;

(d) the assets of the trust upon which tax has been assessed have not been distributed to any beneficiary inside North Carolina; and

(e) Settlor was never a resident of North Carolina.

44. Defendant's improper assessments deprived Plaintiff of property.

45. Therefore Section 105-160.2 and its application to Plaintiff are unconstitutional.

**THIRD CLAIM FOR RELIEF**
**(Violation of the North Carolina Constitution)**

46. The allegations of paragraphs 1 through 45 are incorporated herein by reference.

47. Defendant improperly assessed taxes against Plaintiff.

48. These assessments deprived Plaintiff of property without due process and in violation of the Commerce Clause of the United States Constitution.

49. These deprivations are a violation of Section 19 of the North Carolina Constitution.

WHEREFORE, Plaintiff respectfully prays that this Court:

1. Find that Section 105-160.2 is unconstitutional because it violates the Due Process Clause and the Commerce Clause of the U.S. Constitution and Section 19 of the North Carolina Constitution.

2. Require Defendant to refund all taxes, penalties and interest previously paid by Plaintiff pursuant

to Section 105-160.2 for tax periods 2005, 2006, 2007 and 2008, together with interest as required by law.

3. Enjoin Defendant from enforcing any assessments issued pursuant to Section 105-160.2, or to issue future assessments based on this statute against Plaintiff.

4. Award Plaintiff such other and further relief as this Court deems just and proper.

This 20th day of June, 2012.

Respectfully submitted,

/s/ Thomas D. Myrick
Thomas D. Myrick
N.C. State Bar No. 12645
Neil T. Bloomfield
N.C. State Bar No. 37800

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ATTORNEYS FOR PLAINTIFF

| | |
|---|---|
| STATE OF NORTH CAROLINA<br>COUNTY OF WAKE | IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 12 CVS 8740 |
| THE KIMBERLY RICE KAESTNER 1992 TRUST,<br>Plaintiff,<br>v.<br>NORTH CAROLINA DEPARTMENT OF REVENUE,<br>Defendant | **OPINION AND ORDER ON DEFENDANT'S MOTION TO DISMISS**<br>(Filed Feb. 11, 2013) |

THIS MATTER comes before the court on Defendant North Carolina Department of Revenue's Motion to Dismiss ("Motion") Plaintiff's various claims pursuant to Rules 12(b)(1), (2) and (6) of the North Carolina Rules of Civil Procedure ("Rule(s)"); and

THE COURT, having reviewed the Motion, briefs in support and in opposition thereof and other appropriate matters of record, FINDS, CONCLUDES and ORDERS that the Motion is GRANTED in part, and DENIED in part, for the reasons stated herein.

*Moore & Van Allen, P.L.L.C. by Thomas D. Myrick, Esq. and Neil T. Bloomfield, Esq. for Plaintiff.*

*North Carolina Department of Revenue by Kay Linn Miller Hobart, Esq. and Peggy Vincent, Esq. for Defendant.*

Procedural Posture

[1] The Kimberly Rice Kaestner 1992 Trust brings the present action and asks this court to determine that as it relates to this action, North Carolina General Statute § 105-160.2 (hereinafter, references to North Carolina General Statutes will be to "G.S.") violates the Due Process Clause and the Commerce Clause of the United States Constitution and Section 19 of the North Carolina Constitution. Plaintiff seeks a refund of all taxes, penalties and interest paid by it pursuant to G.S. 105-160.2 for the tax years 2005 through 2008 ("Constitutional Claims"). Plaintiff further seeks to enjoin Defendant from enforcing any assessments issued pursuant to G.S. 105-160.2 and from issuing future assessments against Plaintiff based on the same statute ("Injunctive Relief").

Factual Background

[2] G.S. 105-160.2 provides, in pertinent part, that the North Carolina Department of Revenue may assess an income tax on the portion of a foreign trust's retained income that is for the benefit of a North Carolina resident.

[3] Plaintiff is a wholly foreign trust. Neither Plaintiff's trustees nor its settlor have ever resided in North Carolina. Plaintiff's situs is located outside North Carolina. All property owned by Plaintiff is located outside of North Carolina. Plaintiff has never made a distribution to any beneficiary residing in North Carolina. Plaintiff derives no income within

North Carolina or from North Carolina sources. It apparently is uncontested that Plaintiff's sole connection to North Carolina is the presence of Plaintiff's current beneficiaries, Mrs. Kimberly Rice Kaestner and her three children ("Beneficiaries") within the State.

[4] Plaintiff operates as a discretionary trust, with the Trustee having absolute discretion as to whether distributions are made to the Beneficiaries. None of the Beneficiaries may make a demand on Plaintiff for a distribution nor do the Beneficiaries have any rights as to Plaintiff's assets.

[5] Plaintiff paid taxes to Defendant pursuant to G.S. 105-160.2 for the calendar years 2005 through 2008 based solely on the presence of the Beneficiaries within North Carolina.

[6]. In 2009, Plaintiff filed claims with Defendant for a refund of all taxes paid pursuant to G.S. 105-160.2 for the tax years 2005 through 2008. Those claims were denied by Defendant.

[7] In 2010, Plaintiff filed an Objection and Request for Departmental Review based on Defendant's denial of Plaintiff's 2009 claims. Defendant again denied Plaintiff's claims.

[8] In 2011, Plaintiff commenced an action before the Office of Administrative Hearings seeking the same relief it seeks here. The Office of Administrative Hearings dismissed Plaintiff's action based on lack of jurisdiction because the sole issue for determination was the constitutionality of G.S. 105-160.2.

[9] Plaintiff then filed its civil action with this court pursuant to G.S. 105-241.17. All other requirements of G.S. 105-241.17 have been satisfied, and this case is properly before the court.

Discussion

[10] Plaintiff contends the taxation scheme outlined in G.S. 105-160.2 is unconstitutional under the Due Process Clause of the United States Constitution ("Due Process Clause") because the mere presence of a beneficiary within the state is not a sufficiently substantial connection with North Carolina to justify the state imposing a tax on Plaintiff's retained income. Plaintiff further argues that G.S. 105-160.2 is unconstitutional under the Due Process Clause because there is no rational relationship between the tax imposed on Plaintiff by G.S. 105-160.2 and any benefit provided to Plaintiff by the state.

[11] Plaintiff also argues that G.S. 105-160.2 is unconstitutional under the Commerce Clause of the United States Constitution ("Commerce Clause") because: (a) the tax is not applied to an activity with a substantial nexus to North Carolina; (b) the tax is not fairly apportioned; (c) the tax discriminates against interstate commerce and (d) the tax is not fair relative to the services provided to Plaintiff by North Carolina.

[12] Lastly, Plaintiff contends that G.S. 105-160.2 is unconstitutional under Section 19 of the North Carolina Constitution ("Section 19") because the

statute deprived Plaintiff of property without due process of law and in violation of the Commerce Clause.

[13] The Motion seeks dismissal of Plaintiff's Constitutional Claims pursuant to Rule 12(b)(6) and dismissal of the Injunctive Relief sought by Plaintiff pursuant to Rules 12(b)(1), (2) and (6). In support of the Motion, Defendant argues that Plaintiff's Constitutional Claims fail as a matter of law because G.S. 105-160.2, on its face, conforms to the Due Process Clause, the Commerce Clause and Section 19. Plaintiff also submits that the Injunctive Relief sought by Plaintiff is barred by sovereign immunity and G.S. 105-241.19.

[14] Turning first to Plaintiff's prayer for Injunctive Relief, the court FINDS and CONCLUDES that G.S. 105-241.19 sets out the exclusive remedies for disputing the denial of a requested refund and expressly prohibits actions for injunctive relief to prevent the collection of a tax. Therefore, Plaintiff cannot pursue Injunctive Relief in this action, and the Motion should be GRANTED as to the Injunctive Relief sought by Plaintiff. Plaintiff's Injunctive Relief claim should be DISMISSED.

[15] Turning next to Plaintiff's Constitutional Claims, the court notes that dismissal of a claim pursuant to Rule 12(b)(6) is appropriate "when the complaint on its face reveals that no law supports plaintiff's claim. . . ." *Jackson v. Bumgardner*, 318 N.C. 172, 175 (1986). Conversely, a claim should not be dismissed pursuant to Rule 12(b)(6) unless, "it appears

beyond a reasonable doubt that the plaintiff could not prove any set of facts in support of his claim that would entitle him to relief." *Sutton v. Duke*, 277 N.C. 94, 108 (1970). A party may move to dismiss under Rule 12(b)(6) to test the legal sufficiency of a complaint asserting constitutional issues. *N.C. E. Mun. Power v. Wake Cnty.*, 100 N.C. App. 693 (1990).

[16] It appears to the court that this issue is a matter of first impression in North Carolina. This fact is apparently uncontested by Defendant. There is no affirmative case law in North Carolina upholding the constitutionality of G.S. 105-160.2 that bars Plaintiff's Constitutional Claims. Further, neither the court nor the parties have found any binding law from other sources that upholds a taxation scheme similar to G.S. 105-160.2. The cases cited by Defendant in support of the Motion are not entirely analogous, either legally or factually, to the present action and are, for the most part, from other jurisdictions. Therefore, the court has no basis to conclude that Plaintiff's Constitutional Claims, on their face, must fail as a matter of law.

[17] In addition, Plaintiff cites to a number of similar cases that support its contention that G.S. 105-160.2 is unconstitutional. It appears to the court that there is at least a colorable argument that North Carolina's imposition of a tax on a foreign trust based solely on the presence of a beneficiary in the state does not conform with the Due Process Clause, the Commerce Clause or Section 19. In so finding, the court does not pass judgment on the ultimate constitutionality of G.S. 105-160.2. The court only concludes that

there is some basis in the law to support Plaintiff's claims.

[18] The Motion now before the court has a somewhat unusual posture. To grant the Motion, the court would have to conclude, as a matter of law, that G.S. 105-160.2 conforms to the Due Process Clause, the Commerce Clause and Section 19. Given that there appear to be no remaining factual issues here, and the fact that a Rule 12(b)(6) motion may be used to test the legal sufficiency of a constitutional claim, the court might appropriately determine now the ultimate issue of the constitutionality of G.S. 105-160.2 in the context of this action. However, at the hearing on the Motion, counsel for Defendant contended that this court should not determine the present action on its merits and instead base its decision solely on the narrow legal issue of whether Plaintiff has failed to state a claim upon which relief may be granted. This apparently was on the theory that there may be relevant facts not currently of record that could impact the ultimate outcome of this matter. Upon due consideration, the court declines to reach the ultimate constitutionality of G.S. 105-160.2 at this time, and instead limits itself to determining whether Plaintiff's claims fail as a matter of law.

[19] Based on the foregoing, the court CONCLUDES that Plaintiff's Constitutional Claims are sufficient to withstand the Motion, and the Motion therefore should be DENIED as to Plaintiff's Constitutional Claims.

THEREFORE, it hereby is ORDERED that:

[20] As to Plaintiff's claim for Injunctive Relief, the Motion is GRANTED and Plaintiff's Injunctive Relief claim is DISMISSED.

[21] As to Plaintiff's Constitutional Claims, the Motion is DENIED.

This the 11th day of February, 2013.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Chief Special Superior Court Judge
for Complex Business Cases

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|---|---|
| **STATE OF NORTH CAROLINA**<br>**COUNTY OF WAKE** | **IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 12 CVS 8740** |
| **THE KIMBERLY RICE KAESTNER 1992 FAMILY TRUST,**<br>**Plaintiff,**<br>**v.**<br>**NORTH CAROLINA DEPARTMENT OF REVENUE,**<br>**Defendant.** | **ANSWER**<br>(Filed Jun. 17, 2013) |

NOW COMES the Defendant, THE NORTH CAROLINA DEPARTMENT OF REVENUE ("Department"), and hereby responds to the Complaint of the Plaintiff, THE KIMBERLY RICE KAESTNER 1992 FAMILY TRUST ("Trust") and hereby alleges and says:

1. Denied.

2. The allegations of paragraph 2 are legal conclusions to which no response is necessary or required. To the extent a response is required, the allegations of paragraph 2 are denied.

3. Admitted.

4. The terms of the refund denial letter from the Department speak for themselves. Except as

specifically admitted herein, the allegations of paragraph 4 are denied.

5. Denied.

6. Denied.

7. Denied.

8. The allegations of paragraph 8 are ambiguous as "situs" has numerous legal definitions. Further, the allegations of paragraph 8 are legal conclusions to which no response is necessary or required. To the extent a response is required, the allegations of paragraph 8 are denied.

9. Admitted.

10. Admitted.

11. Admitted

12. Admitted that on the date of the trust's creation, the primary beneficiaries of the trust were the settlor's descendants. The Department lacks sufficient information to admit or deny the remaining allegations contained in paragraph 12. Therefore, the remaining allegations are denied.

13. The Department lacks sufficient information to admit or deny the allegations contained in paragraph 13. Therefore, the allegations are denied.

14. The allegations of paragraph 14 are legal conclusions to which no response is necessary or

required. To the extent a response is required, the allegations of paragraph 14 are denied.

15. Admitted.

16. The Department lacks sufficient information to admit or deny the allegations contained in paragraph 16. Therefore, the allegations are denied.

17. Admitted that pursuant to Section 1.2 of the Trust Agreement, the trust was divided into separate share trusts; one for each of the settlor's three children, one of which was Kimberly Rice Kaestner, who was a resident and domiciliary of North Carolina at that time. As to the remaining allegations of paragraph 17, the Department lacks sufficient information to admit or deny them. Therefore, the remaining allegations in paragraph 17 are denied.

18. Admitted.

19. The Department lacks sufficient information to admit or deny the allegations contained in paragraph 19. Therefore, the allegations are denied.

20. The Department lacks sufficient information to admit or deny the allegations contained in paragraph 20. Therefore, the allegations are denied.

21. The Department lacks sufficient information to admit or deny the allegations contained in paragraph 21. Therefore, the allegations are denied.

22. Denied that the Trust filed Form D-407 "Estates and Trusts Income Tax Return" with the Department in 2005, 2006, 2007 and 2008. The Trust filed

returns for tax years 2005, 2006 and 2007 in 2008, and filed a return for tax year 2008 in 2009. The Trust paid the tax it shows on its returns for tax years 2005 through 2008. However, since these returns were not audited, the Department has no information as to their correctness. The Trust has made no filings nor paid any taxes to North Carolina for any tax years after 2008. Except as admitted herein, any other allegations of paragraph 22 are denied.

23. The Department lacks sufficient information to admit or deny the allegations contained in paragraph 23. Therefore, the allegations are denied.

24. Admitted that the Trust filed a claim for a refund for tax years 2005, 2006, and 2007 on September 9, 2009. Further admitted that the Trust filed a claim for a refund for tax year 2008 by letter dated October 20, 2009. The Department lacks sufficient information as to the date of receipt of the 2008 claim for refund, and therefore, that allegation as to its filing date is denied. Admitted that the claim for refund was based on the Trust's assertion that North Carolina General Statute § 105-160.2 is unconstitutional because it allegedly violates the Due Process Clause and the Commerce Clause of the U.S. Constitution and Section 19 of Article 1 [sic] of the Constitution of the State of North Carolina.

25. Admitted.

26. Admitted.

27. The Department lacks sufficient information as to the date the Trust filed its claim for refund for the 2008 tax year to enable the Department to admit or deny the allegations contained in paragraph 27. Therefore, the allegations are denied.

28. Admitted that the Trust filed an Objection and Request for Departmental Review for tax years 2005, 2006, 2007 and 2008 ("Objections"). However, the Department's file stamped receipt date reflects that the Objections were filed May 18, 2010. Except as herein admitted, the remaining allegations of paragraph 28 are denied.

29. Admitted.

30. Admitted.

31. The terms of the Notice of Final Determination Letter from the Department speak for themselves. Except as specifically admitted herein, the allegations of paragraph 31 are denied.

32. Admitted.

33. Denied. The Department filed its motion to dismiss on May 4, 2011.

34. Admitted.

35. Admitted that the Trust filed this action in compliance with North Carolina General Statute § 105-241.17. However, the Department lacks sufficient knowledge of taxes, penalties and interest that may be due for tax years 2009 through 2012 since no North Carolina return was filed for those years.

Therefore, the allegation as to no amounts being due and owing is denied.

36. The Department realleges and incorporates its responses to paragraphs 1 through 35 by reference.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. The Department realleges and incorporates its responses to paragraphs 1 through 40 by reference.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. The Department realleges and incorporates its responses to paragraphs 1 through 45 by reference.

47. Denied.

48. Denied.

49. Denied.

## AFFIRMATIVE DEFENSES

1. Plaintiff's requested injunctive relief is expressly barred by statute and principles of sovereign immunity.

2. N.C. Gen. Stat. § 105 241.19 provides:

> The remedies in G.S. 105 241.11 through G.S. 105 241.18 set out the exclusive remedies for disputing the denial of a requested refund, a taxpayer's liability for a tax, or the constitutionality of a tax statute. Any other action is barred. Neither an action for declaratory judgment, an action for injunction to prevent the collection of a tax, nor any other action is allowed.

3. By statute and law, the Plaintiff is not entitled to injunctive relief nor to a declaratory judgment.

WHEREFORE, Defendant respectfully prays the Court as follows:

1. Deny all relief requested in the Complaint;

2. Tax all costs of this action and attorneys' fees against the Plaintiff; and

3. Grant such other relief as the Court deems appropriate.

Respectfully submitted, this the 13th day of June, 2013.

ROY COOPER
Attorney General

/s/ Kay Linn Miller Hobart
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[Certificate Of Service Omitted]

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| STATE OF NORTH CAROLINA<br>COUNTY OF WAKE | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>12-CVS-8740 |
| THE KIMBERLY RICE KAESTNER 1992 FAMILY TRUST,<br>Plaintiff,<br>v.<br>NORTH CAROLINA DEPARTMENT OF REVENUE,<br>Defendant. | **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**<br>(Filed Jul. 8, 2014) |

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Plaintiff, The Kimberley Rice Kaestner 1992 Family Trust ("Plaintiff Trust"), by and through counsel, hereby respectfully moves the Court for Summary Judgment in its favor on all claims in this action. Plaintiff Trust submits that the pleadings, depositions, answers to interrogatories, affidavits, and applicable law show there is no genuine issue of material fact warranting a trial of this action, and that Plaintiff Trust is entitled to judgment as a matter of law. In compliance with this Court's Case Management Order dated October 11, 2014, Plaintiff Trust notified Defendant of this motion. Defendant opposes the motion and wishes to be heard.

In support of this motion, Plaintiff Trust submits contemporaneously herewith its Memorandum of Law in Support of Plaintiff Trust's Motion for Summary Judgment and the Affidavit of David H. Bernstein, Plaintiff Trust's trustee, which show, in particular, that

1. From 2005 through 2008, Defendant annually taxed Plaintiff Trust pursuant to N.C. Gen. Stat. § 105-160.2 ("Section 105-160.2").
2. On June 21, 2012, Plaintiff Trust filed its Complaint alleging that Section 105-160.2 is unconstitutional as it violates the Due Process Clause of the U.S. Constitution, the Commerce Clause of the U.S. Constitution, and Section 19 Article I of the North Carolina Constitution.
3. Plaintiff Trust paid taxes to the State of North Carolina in an amount exceeding $1.3 million dollars [sic] for the years 2005 through 2008.
4. It is undisputed that Plaintiff Trust was established, operated, and governed by laws outside of the state of North Carolina by a non-resident settlor at a time when none of the beneficiaries were residents or domiciliaries of North Carolina, and that it held and managed all of its assets outside of North Carolina, was overseen by a nonresident trustee, and did not make any distribution to any North Carolina beneficiary.
5. Plaintiff Trust did not have minimum contacts with the State of North Carolina and, therefore, the tax on Plaintiff Trust violates the Due Process Clause and Section 19 Article I of the North Carolina Constitution.

6. Plaintiff Trust's activities did not have a substantial nexus to North Carolina, and therefore, the tax on Plaintiff Trust violates the Commerce Clause.

7. As a result, Plaintiff Trust is entitled to a full refund of the taxes paid for the period of 2005 through 2008.

WHEREFORE, Plaintiff Trust prays the Court for an Order granting its motion for summary judgment, declaring Section 105-160.2 unconstitutional and ordering Defendant to refund all taxes and penalties paid by Plaintiff Trust pursuant to Section 105-160.2, with interest.

This 2nd day of July, 2014.

Respectfully submitted,

/s/ Neil T. Bloomfield
Thomas D. Myrick
N.C. State Bar No. 12645
Neil T. Bloomfield
N.C. State Bar No. 37800

MOORE & VAN ALLEN, PLLC
100 North Tryon Street – Floor 47
Charlotte, North Carolina 28202
Telephone: (704) 331-1000
Facsimile: (704) 331-1159

ATTORNEYS FOR PLAINTIFF

[Certificate Of Service Omitted]

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| STATE OF NORTH CAROLINA<br>COUNTY OF WAKE | IN THE<br>GENERAL COURT<br>OF JUSTICE<br>SUPERIOR COURT<br>DIVISION<br>12-CVS-8740 |
| THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST,<br><br>Plaintiff,<br><br>v.<br><br>NORTH CAROLINA DEPARTMENT OF REVENUE,<br><br>Defendant. | **AFFIDAVIT OF DAVID H. BERNSTEIN**<br><br>(Filed Jun. 8, 2014) |

I, David H. Bernstein, being duly sworn, depose and say:

1. I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the matters contained herein.

2. I was, and remain, the trustee of The Kimberley Rice Kaestner 1992 Family Trust (the "Plaintiff Trust") from 2005 and through all times relevant to this action.

3. The Joseph Lee Rice, III Family 1992 Trust (the "Family Trust") was created under an agreement dated December 30, 1992 (the "Trust Agreement") between Joseph Lee Rice III as settlor (the "Settlor") and

William B. Matteson as trustee (the "Initial Trustee"). Attached as Exhibit A is a true and correct copy of the Trust Agreement.

4. The Family Trust was created in New York, and the Trust was and is governed by New York law.

5. At the Family Trust's creation:

a. The Settlor was a resident and domiciliary of New York;

b. The Initial Trustee was a resident and domiciliary of New York;

c. The primary beneficiaries of the Family Trust were the Settlor's descendants, none of whom were residents or domiciliaries of North Carolina;

d. The contingent beneficiaries of the Family Trust were the Settlor's spouse and sister, neither of whom were residents or domiciliaries of North Carolina;

e. All of the assets contributed to the Family Trust were located outside of North Carolina; and

f. The Family Trust was a separate tax paying entity subject to New York income tax.

6. In 1995, the Initial Trustee moved to Florida.

7. On December 30, 2002, pursuant to Section 1.2 of the Trust Agreement, the Family Trust was divided into separate share trusts, one for each of the

Settlor's three children, one of whom is Kimberley Rice Kaestner (formerly Kimberley E. Rice). This is the Kimberley Rice Kaestner 1992 Family Trust ("Plaintiff Trust").

8. At the time the Family Trust was divided into separate share trusts, Kimberley Rice Kaestner was a resident and domiciliary of North Carolina, having moved to North Carolina in 1997, almost five years after the Family Trust's creation.

9. The separate share trusts are administered by the trustee under the terms of the Trust Agreement (Exhibit A, Art. 1, § 1.2.)

10. The current beneficiaries of the separate share trust for the benefit of Kimberley Rice Kaestner are Kimberley Rice Kaestner and her three children, all of whom were residents and domiciliaries of North Carolina in the tax years at issue.

11. The contingent remainder beneficiaries of the Plaintiff Trust, none of whom are North Carolina residents, are the Settlor's other two children (both of whom are residents and domiciliaries of New York), the Settlor's spouse (who also is a resident and domiciliary of New York), and the Settlor's sister (who is a resident and domiciliary of Connecticut).

12. The Family Trust, consisting of the three separate share trusts, is an irrevocable *inter vivos* trust (Exhibit A, Art. 10.)

13. In 2005, the Initial Trustee resigned, at which time the Settlor appointed me to serve as

trustee (the "Trustee"). When appointed I was a Connecticut resident and domiciliary and remain so today.

14. Between 2005 and 2008, the assets held in the Plaintiff Trust consisted of equities, mutual funds, and investments in partnerships. The custodian for these assets was State Street Bank (formerly Investors Bank & Trust), located in Boston, Massachusetts. Later, I changed the custodian to Cambridge Appleton Trust, also located in Boston, Massachusetts. Other ownership documents related to assets held in the Plaintiff Trust were located at my offices at Debevoise & Plimpton LLP, in New York, New York. The financial books and records of the Plaintiff Trust were kept at the offices of Eisner Amper LLP, in New York, New York, and the legal records of the Plaintiff Trust were maintained at my offices in New York, New York. Eisner Amper LLP has prepared all the tax returns for the Plaintiff Trust in New York, New York. Eisner Amper LLP and Debevoise & Plimpton LLP prepared the trust accountings in New York, New York.

15. None of the Plaintiff Trust's assets was located in North Carolina, and none of the Plaintiff Trust's income was derived directly from a North Carolina source. The Plaintiff Trust owned no real or personal property located in North Carolina. In 2005, one of the investments of the Family Trust was a partnership interest in the DE Shaw Composite Fund, LLC. The Family Trust held a 0.0827% non-managing member interest in this fund. This fund, in turn, invested in other investments, through which the Family Trust incurred a $0.11 indirect loss attributable to an

unknown North Carolina source. One-third of this loss was attributed to Plaintiff Trust in the amount of approximately $0.04. In 2007, one of the investments of the Rice Family Investors (KER) ("KER Investors"), an entity wholly owned by Plaintiff Trust, was a partnership interest in Magnitude U.S. Partners Fund. KER Investors held a 0.6846% non-managing member interest in that fund. That fund, in turn, invested in other investments, through which KER Investors incurred an indirect $2.10 net loss attributable to an unknown North Carolina source.

16. The beneficiaries have no right to the assets or income of the Plaintiff Trust, as distributions are made at the sole discretion of the Trustee. (Exhibit A, Art. 1, § 1.2(a).) The beneficiaries have no right to control the investment of the Plaintiff Trust assets, and I did not take any direction or accept any recommendation from the beneficiaries concerning my investment decisions. To the contrary, to assist me with investment decisions and allocations, I consulted solely with Rocaton Investment Advisors, LLC, a company located in Norwalk, Connecticut. I had complete discretion to make all investment decisions on my own, taking into account Rocaton's recommendations, and I exercised that discretion without any input from the beneficiaries.

17. From the Trust's creation through and including the 2008 tax period, no distribution was made to a North Carolina beneficiary.

18. In 2009, the Plaintiff Trust was decanted with a significant portion of its assets transferred into the KER Family Trust.

19. The Plaintiff Trust paid taxes to North Carolina on all of its income from 2005 to 2008.

20. Over these four tax years, the Plaintiff Trust paid to North Carolina taxes in an amount exceeding $1.3 million.

21. None of the Plaintiff Trust's income taxed by North Carolina was distributed to anyone anywhere, let alone to any beneficiary in North Carolina.

22. The Plaintiff Trust sought refunds on the taxes paid in the following amounts:

a. $79,634.00 for the 2005 tax year;

b. $106,637.00 for the 2006 tax year;

c. $1,099,660.00 for the 2007 tax year,

d. $17,241.00 for the 2008 tax year.

23. The Department denied the Plaintiff Trust's request for a refund on February 11, 2011.

24. During discovery in this matter the Plaintiff Trust produced records of the Family Trust and of the Plaintiff Trust. The records included: accountings, documents evidencing investment decisions, and communications with the Family Trust's and Plaintiff Trust's accountants and investment advisors. The records also included records of my limited contacts with the beneficiaries, none of which occurred in North Carolina.

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Dated: July 2, 2014

/s/ David H. Bernstein
David H. Bernstein

SWORN to and subscribed before me.

This 2nd day of July, 2014

/s/ Susan Bange Avram
Notary Public for the State
of New York

My Commission Expires: 7/31/2019

[NOTARY STAMP]

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[Certificate Of Service Omitted]

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**EXHIBIT A**

THIS AGREEMENT is made and delivered as of the 30th day of December, 1992, between JOSEPH LEE RICE, III, of New York, New York (hereinafter referred to as the "Settlor"), and WILLIAM B. MATTESON of New York, New York (hereinafter and his successor referred to as the "Trustee"), creating the "Joseph Lee Rice, III Family 1992 Trust".

WITNESSETH:

The Settlor hereby assigns, transfers and conveys to the Trustee the property described in Schedule A hereto annexed (hereinafter, together with all additions thereto, referred to as the "Trust Fund"), receipt of which is hereby acknowledged by the Trustee, which is to be held by the Trustee, IN TRUST, for the uses and purposes and on the terms and conditions herein set forth.

## ARTICLE FIRST

### Distributions

1.1. Initial Term. For a period (the "Initial Term.") commencing on the date of this Agreement (the "Commencement Date"), and expiring on the date ten (10) years from the Commencement Date, the Trustee's duties with respect to the disposition of the income and principal of the Trust Fund shall be as follows:

(a) Distributions of Income. The Trustee may pay or apply so much or all of the net income therefrom to or to the use of such member or members of a class of persons consisting of the Settlor's descendants, whenever born, in such amounts and proportions as the Trustee in the Trustee's absolute discretion may from time to time deem advisable, accumulating any net income not so paid or applied and adding the same to principal.

(b) Distributions of Principal. The Trustee may pay or apply so much or all of the principal thereof to or to the use of such member or members of a class of persons consisting of the Settlor's descendants, whenever born, in such amounts and proportions as the Trustee in the Trustee's absolute discretion may from time to time determine.

1.2. After Initial Term. Upon the termination of the Initial Term, the Trustee shall, after bringing into account any income or principal which may have been paid or applied to or to the use of any child of the Settlor or any of such child's descendants pursuant to Section 1.1 hereof, divide and set apart the Trust Fund into so many equal and separate shares that there shall be one (1) such share for each of the Settlor's children who is then living and one (1) such share for the each of the Settlor's children who is not then living but who shall have left then living descendants (a "Predeceased Child"), and each share set aside for a Predeceased child shall be further divided into subshares, per stirpes, for such Predeceased Child's then living descendants (each of the Settlor's then living children and each of the then living descendants of a Predeceased Child shall be hereinafter individually referred to as a "Beneficiary", and collectively referred to as the "Beneficiaries"). The Trustee's duties with respect to the disposition of the income and principal of each such share or subshare shall be as follows:

(a) Distributions of Income. The Trustee may pay or apply so much or all of the net income therefrom to or to the use of such member or members of a class of

persons consisting of the Beneficiary for whom such share or subshare was set apart and such Beneficiary's descendants, whenever born, in such amounts and proportions as the Trustee in the Trustee's absolute discretion may from time to time deem advisable, accumulating any net income not so paid or applied and adding the same to principal.

(b) Distributions of Principal. The Trustee may pay or apply so much or all of the principal thereof to or to the use of such member or members of a class of persons consisting of the Beneficiary for whom such share or subshare was set apart and such Beneficiary's descendants, whenever born, in such amounts and proportions as the Trustee in the Trustee's absolute discretion may from time to time determine.

(c) Termination. Upon the first event to occur of: (i) a Beneficiary's death or (ii) a Beneficiary's having attained the age of forty (40) years:

(1) The Trustee shall transfer, pay over and deliver the then principal of such Beneficiary's share to such Beneficiary, if such Beneficiary shall then be living.

(2) If such Beneficiary shall not then be living, the Trustee Shall transfer, pay over and distribute the then principal of such Beneficiary's share as follows:

(i) To or in trust for the benefit of such persons and objects, in such amounts, shares and proportions, and either absolutely or upon such lawful trusts,

terms and conditions, as the Beneficiary shall appoint by will; provided, however, that such will makes express reference to this power of appointment; and provided further, however, that such power of appointment shall not be exercisable in favor of such Beneficiary's estate or creditors,

(ii) The Trustee shall subdivide any of such principal not effectively so appointed into subshares, per stirpes, for such Beneficiary's then living descendants, and the Trustee shall hold each such subshare as a separate share in trust under this Agreement for the benefit of the descendant for whom such subshare was set apart and the descendant shall be the Beneficiary of such subshare, which shall be held in trust under this Paragraph (c), subject to all the terms and conditions governing each share of the Trust Fund.

(iii) If such Beneficiary shall not be survived by any descendants, the Trustee shall transfer, pay over and distribute such Beneficiary's share, per stirpes, to the then living descendants of such Beneficiary's nearest ancestor who was a descendant of the Settlor, if any, or if none, then to the Settlor's then living descendants, per stirpes, or if none, then such principal shall be disposed of pursuant to the provisions of Article THIRD of this Agreement.

(iv) If, after taking into account any exemption allocated to any share or subshare distributable under this Subdivision, a generation-skipping transfer tax would become payable on any portion or all of such share or subshare because such distribution would be

to a skip person with respect to the transfer of such property to such person, notwithstanding anything to the contrary hereinabove in this Paragraph (c) provided, the Trustee shall transfer, pay over and distribute such property to or in trust for the benefit of such persons and objects, in such amounts, shares and proportions, and either absolutely or upon such lawful trusts, terms and conditions, as the Beneficiary shall appoint by will, including, without limitation, to the Beneficiary's estate, provided, however, that such will makes express reference to this power of appointment; and in default of such appointment, the Trustee shall transfer, pay over and distribute such property as if the Beneficiary had not been entitled to exercise such power of appointment.

(v) If, pursuant to the preceding provisions of this Paragraph (c), any principal of any share or subshare held under this Article would become distributable to any person for whom a share or subshare is then held in trust under this Agreement, then such principal shall not be delivered to such person but in lien thereof shall be added to the principal of the share or subshare then held in trust for such person, thereafter to follow the disposition of the share to which it is added in all respects as to both income and principal.

(vi) If, pursuant to the preceding provisions of this Paragraph (c), any principal of any share or subshare held under this Article would become distributable to an individual's descendants, per stirpes, then, in making such distribution, the Trustee shall not bring into account any income or principal which may

have been paid or applied to or to the use of any such descendant or such descendant's ancestors or descendants.

1.3. No Distributions of Principal until Termination of Associates IV Limited Partnership. Notwithstanding anything to the contrary hereinabove provided, in no event shall any portion of a limited partnership interest in the Clayton & Dubilier Associates IV Limited Partnership, a Connecticut limited partnership ("Associates IV Limited Partnership"), be transferred, paid over or distributed to the Settlor's descendants.

1.4. Trustee's Discretion for Distributions. (a) If income and principal may be paid or applied to or to the use of such member or members of a class of persons in such amounts and proportions as the Trustee may deem advisable under the provisions of this Article, the Trustee in the Trustee's discretion may pay or apply the same to or to the use of any one member of such class or apportion it for the benefit of various members to the exclusion of other members in such manner as the Trustee may deem advisable.

(b) In exercising the discretion conferred upon the Trustee to use income or principal under any provision of this Article, it shall not be necessary for the Trustee to inquire as to any other income or property of the person for whom income or principal is to be used and the Trustee may consider only the interests of the person or persons for whom it is deemed advisable to use income or principal and not the interests

of any other person who may at any time be or become interested in any trust hereunder.

(c) The Settlor directs the Trustee to consider the Trust Fund and any share or subshare held under this Agreement as a family asset and to be liberal in the exercise of the discretion conferred upon the Trustee and to use income and principal of such trust, even to the entire amount thereof, to meet the needs of the Beneficiaries, including, without limitation, to provide for their health, education and welfare, to purchase or provide a home for them, and to aid them at the time of marriage or in setting up a business, rather than to preserve such principal for the benefit of the persons entitled thereto at the termination of the trust.

## ARTICLE SECOND

### Termination

The Trustee may at any time in the Trustee's discretion terminate the Trust Fund or any trust hereunder if in the Trustee's judgment it would be inadvisable to continue to hold it in trust; provided, however, that in no event may the Trustee terminate the Trust Fund or any trust hereunder prior to the earlier of (i) the termination and winding up of Associates IV Limited Partnership and (ii) the date the trust created hereunder ceases to be a limited partner of Associates IV Limited Partnership. Upon termination of the Trust Fund during the Initial Term, the Trustee shall transfer, pay over and deliver, free of trust, the assets constituting

the then principal of the Trust Fund or to the Settlor's then living descendants, per stirpes, after bringing into account any income or principal which may have been paid or applied to or to the use of any such descendant or any such descendant's ancestor or descendant pursuant to Section 1.1 hereof. Upon termination of any trust hereunder after the termination of the Initial Term, the Trustee shall transfer, pay over and deliver the then principal of such trust to the person or persons then eligible to receive the income of such trust, in such amounts and proportions as the Trustee in the Trustee's absolute discretion may deem advisable.

## ARTICLE THIRD

### Contingent Disposition

If, upon the happening of any contingency, any part or all of the principal of the Trust Fund, or any trust under this Agreement, shall be undisposed of pursuant to the provisions of this Agreement other than this Article, then, upon the happening of such contingency, the Trustee shall transfer, pay over and deliver such undisposed of property to the Settlor's Spouse, if she shall then be living, or if she shall not then be living, to the Settlors sister, JERE ANNE VOCKINS, if she shall then be living, or if she shall not then be living, to her descendants who shall then be living, per stirpes.

## ARTICLE FOURTH

### Distributions to Minors and Incompetents

4.1. Distributions to Minors and Incompetents. Whenever income or principal is to be paid to or used for the benefit of a person under the age of twenty-one (21) years (referred to as a "minor" in this Article) or a person who in the sole judgment of the Trustee is incapable of managing his or her own affairs, the Trustee may make payment of such to property in any or all the following ways:

(a) By paying such property to the parent, guardian or other person having the care and control of such minor for such minor's benefit or to any authorized persons as custodian for such minor under any applicable Gifts to Minors Act, and where permitted under applicable law, with authority to authorize any such custodian to hold such property until the minor attains the age of twenty-one (21) years where permitted; provided, however, that no such payment shall be made to the Settlor or the Settlor's Spouse.

(b) By paying such property to the guardian, committee conservator or other person having the care and control of such incapable person for such incapable person's benefit; provided, however, that no such payment shall be made to the Settlor or the Settlor's Spouse.

(c) By paying directly to such minor or incapable person such sums as the Trustee may deem advisable as an allowance.

(d) By expending such property in such other manner as the Trustee in the Trustee's discretion shall determine will benefit such minor or incapable person.

4.2. Trustee's Discretion; Final Distribution. If principal becomes vested in and payable to a minor, the Trustee may make payment thereof in any of the ways set forth in the preceding Section 4.1 of this Article or may defer payment of any part or all thereof, meanwhile paying or applying to or to the use of such minor so much or all of such principal and of the income therefrom, as the Trustee in the Trustee's discretion may deem advisable. Any income not so expended by the Trustee shall be added to principal. The Trustee shall transfer, pay over and deliver any remaining principal to such minor upon such minor's attaining the age of twenty-one (21) years or to such minor's estate upon death prior to such payment in full.

4.3. Trustee's Discharge. Any payment or distribution authorized in this Article shall be a full discharge to the Trustee with respect thereto.

## ARTICLE FIFTH

## Investment of Trust Fund

5.1. Investment in Associates IV Limited Partnership. (a) The Trustee shall acquire a limited partnership interest in Associates IV Limited Partnership with cash from the Trust Fund but in no event shall this interest exceed 9.9% of all interests in Associates IV Limited Partnership.

(b) The Trustee initially shall invest the balance of the Trust Fund in an actively managed portfolio pursuant to the provisions of Section 5.2 of this Agreement. In no event shall the Trustee invest any portion of the Trust Fund in securities of any entity relying on Section 3(c)(1) of the Investment Company Act of 1940, as amended, as an exemption from registration under the Investment Company Act of 1940, as amended, other than (i) Associates IV Limited Partnership, (ii) any entity managed or sponsored by Clayton, Dubilier & Rice, Inc. or its successors, or (iii) any entity that acts as the general partner of, or acts in a similar capacity for, such entity.

(c) The Trustee acknowledges that he or she has received a copy of; and understands, a no-action letter, dated November 2, 1992 (the "No-Action Letter"), from the Securities and Exchange Commission addressed to Associates IV Limited Partnership.

5.2. Trustee's Powers. Subject to the above restrictions, the Trustee shall have, with respect to any and all property other than the limited partnership interest in Associates IV Limited Partnership, whether real or personal, at any time held by the Trustee hereunder, including funds held for any person under the age of twenty-one (21) years, and whether constituting principal or income therefrom, the following powers, in addition to those granted elsewhere in this Agreement and those conferred by law:

(a) To retain any such property as an investment, whether or not trustees are authorized by

law or by any rule of court to invest trust funds in such property.

(b) To sell any such property (other than the limited partnership interest in Associates IV Limited Partnership) at either public or private sale for cash or on credit of any duration, to exchange any such property and to grant options for the purchase of any such property, including, without limitation, stocks, with or without consideration and without any limitation on the period of any such option.

(c) Subject to the restrictions provided in the No-Action Letter, to invest and reinvest in property of any character, real or personal, foreign or domestic, including, without limitation, bonds, notes, debentures, mortgages, certificates of deposit, common and preferred stocks, shares or interests in partnerships or investment trusts and companies and participations in any common trust fund maintained by the Trustee, whether or not trustees are authorized by law or by any rule of court to invest trust funds in such property.

(d) To consent to and participate in, or to oppose, any foreclosure, liquidation or plan of reorganization, consolidation, merger, combination or other similar plan and to consent to any contract, lease, mortgage, purchase, sale or other action by any corporation pursuant to such plan.

(e) To deposit any such property with any protective, reorganization or similar committee, to delegate discretionary power thereto and to pay part of its expenses and compensation and any assessment levied with respect to such property.

(f) To exercise all conversion, subscription, voting and other rights of whatsoever nature pertaining to any such property and to grant proxies, discretionary or otherwise, with respect thereto.

(g) To manage any real property in the same manner as if the absolute owner thereof, including, without limitation, the power from time to time to lease, or grant options to lease, any such real property for any period of time and although any such period may extend beyond the duration of any trust under this Agreement, with any provisions for renewals thereof, without application to any court; to enter into any covenants or agreements relating to the property so leased or to any improvements then or thereafter erected thereon; to insure against loss by fire or other casualty; and to make partition or enter into any agreements of partition of any real property which, or an interest in which, shall at any time constitute part of any trust under this Agreement, even though a Trustee acting hereunder may hold an interest in the same property in the Trustee's own right or in some other capacity, and to give or receive money or other property for equality of partition. To make ordinary and extraordinary repairs and alterations to any building, to raze old buildings, to erect new buildings and to make other improvements; to set up appropriate reserves out of income for repairs and modernization of any building, including reserves for depreciation and obsolescence, to add such reserves to principal and, in creating such reserves, to use the income from any assets of the trust which holds the property with respect to which such reserve is being created; and, for the amortization of any mortgage on any such

property, to use principal and/or income from any assets of the trust in which such mortgaged property is held; in all such cases without thereafter making any adjustment between principal and income.

(h) To transfer any portion of receipts from income to principal on account of depreciation, depletion, or amortization and to allocate in the Trustee's discretion, in whole or in part, to principal and income, all receipts and disbursements for which no express provision is made hereunder, which allocation shall fully protect the Trustee with respect to any action taken or payment made in reliance thereon.

(i) To make loans and borrow money for any purpose including, without limitation, to or from the Trustee individually or others (other than the Settlor or the Settlor's Spouse), upon such terms, with or without security, as the Trustee may deem advisable and to pledge or mortgage any such property as security.

(j) To appoint and compensate agents (including, without limitation, accountants, custodians, investment advisors, money managers and attorneys, and regardless of whether the Trustee is a principal or employee thereof) to act in the Trustee's behalf and to delegate discretionary power to such agents.

(k) To extend the time of payment of any obligation at any time owing by or to the Trustee or any trust under this Agreement and to compromise, settle or submit to arbitration upon such terms as the Trustee may deem advisable, or to

release, with or without consideration, any claim in favor of or against, any trust under this Agreement.

(l) To allocate to two or more trusts under this Agreement an undivided interest in one or more properties or blocks of securities, including, without limitation, stocks, and to administer any two or more trusts under this Agreement as a single trust by holding the principal of such trusts in one or more consolidated funds in which the separate trusts shall have undivided interests; provided, however, that separate records of each trust shall be maintained.

(m) To cause any such property to be held in nominee registration, with or without indication of the fiduciary character thereof, or unregistered.

(n) In dividing or distributing any trust hereunder, or any part thereof, to make partition, division or distribution of property in kind whether equal or disproportionate, and with or without thereafter making any adjustment for any disproportionate income tax bases in such property, as the Trustee may deem advisable, and, for any such purpose, to determine the value of any such property so far as permitted by law.

(o) To exercise any stock options held in any trust hereunder.

(p) To divide property held in any trust hereunder into two or more separate trusts hereunder and to add the principal of any trust hereunder having substantially identical terms to another trust held hereunder to such other trust, the

property so added thereafter to follow the disposition of the fund to which it is added in all respects as to both income and principal, as the Trustee may deem advisable.

(q) To pay or contest any and all taxes assessed against any trust created hereunder.

(r) To do all such acts, take all such proceedings and exercise all such rights and privileges, although not herein, specifically mentioned, with respect to any such property, as if the absolute owner thereof and in connection therewith to make, execute and deliver any instruments and to enter into any covenants or agreements binding any trust hereunder.

5.3. Associates IV Limited Partnership Votes; Change of Trust Situs. In addition to the powers conferred on the Trustee above, the Trustee shall have the power to participate in all, votes in which limited partners of Associates IV Limited Partnership are permitted to participate pursuant to Associates IV Limited Partnership's amended and restated limited partnership agreement, as amended from time to time, and to change the situs of the trust property of any trust under this Agreement.

5.4. Restrictions on Investment Powers. It being the Settlor's desire that (a) the Trustee shall not confine the investments of the any trust hereunder to those authorized by law or by any rule of court (unless the Trustee shall deem such course advisable) and (b) that the Trustee abide by the investment restrictions provided in the No-Action Letter, the Settlor hereby

declares that the Trustee shall not be liable for any loss sustained by any trust hereunder by reason of the purchase, retention, sale or exchange of any investment made by the Trustee in good faith.

5.5. Conflict of Interest. The Trust Fund may include obligations, shares or other interests in certain corporations or businesses of which the Trustee may be a director, partner, shareholder, officer or employee. The Settlor hereby specifically authorizes and empowers the Trustee to exercise with respect to any such obligations, shares or interests (or any obligations, shares or interests in any successor corporations or businesses) any and all of the powers, authorities and discretions provided in this Agreement, including, without limitation, the power to purchase from, sell to or otherwise deal with himself or herself with respect to the same and to retain and vote the same as long as the Trustee may deem advisable. The Settlor directs that no principle or rule of law relating to self-dealing or divided loyalty shall be applied to any acts of the Trustee with respect to any such obligations, shares or interests. The foregoing provisions of this paragraph are intended to amplify and not to limit the powers and authority granted to the Trustee with respect to the Trust Fund.

5.6. Application of Section 11-2.1(k) of the New York Estates, Powers and Trust Law. The provisions of section 11-2.1(k) of the New York Estates, Powers and Trusts Law with respect to underproductive property, as in effect at the time of this Agreement, or such other

statutory provisions as shall correspond thereto, shall not be applicable to any trust under this Agreement.

5.7. Third Parties Dealing with Trustee. Persons dealing with the Trustee shall not be obligated to look to the application of any moneys or other property paid or delivered to the Trustee or to inquire into the Trustee's authority as to any transaction. All powers granted to the Trustee shall continue until actual distribution of the property.

5.8. Trustee's Liability. (a) Any decision of the Trustee with respect to the exercise or non-exercise by the Trustee of any discretionary power under this Agreement, or the time or manner of the exercise thereof, made in good faith, shall fully protect the Trustee and shall be binding and conclusive upon all persons interested in the Trust Fund.

(b) In no event and under no circumstances shall the Trustee incur any liability either individually or as Trustee with respect to any duty, responsibility, power, authority or discretion of the Trustee under this Agreement unless the same shall be done or omitted by the Trustee in actual bad faith, and the Settlor hereby agrees that any Trustee will at all times be protected and indemnified from the Trust Fund from any and all liability, loss, damages or expenses of whatsoever kind or nature which such Trustee, individually or as Trustee, may at anytime sustain or incur or become liable for in connection with this Agreement and any trust hereby created except by reason of gross negligence,

willful misconduct, fraud or had faith on the part of such Trustee.

5.9. Delegation. Any person acting as Trustee hereunder is authorized at any time and from time to time by a writing instrument delivered to a co-Trustee to delegate to such co-Trustee any ministerial duty, responsibility, power or authority. The revocation of any such delegation shall also be in writing and delivered to such co-Trustee.

## ARTICLE SIXTH

### Income and Principal

Income accrued on any property (whether originally placed in, or subsequently added to, any trust under this Agreement) at the time of its transfer to the Trustee and, with respect to shares of stock (whether originally placed in, or subsequently added to, such trust), dividends declared prior to the transfer of such shares to the Trustee but payable to stockholders of record determined as of a date which is on or subsequent to the date of such transfer, shall be income of such trust. Upon the termination of any estate hereunder, income accrued on property then held in any trust but not yet due and payable, after deducting any charges or advances against it, and dividends on shares of stock declared prior to such termination but payable to stockholders of record determined as of a date which is on or subsequent to the date of such termination, shall belong to the next estate. Distributions in stock of the corporation or association making the

distribution shall be principal. The Trustee is expressly authorized in the Trustee's discretion to amortize premiums paid for trust securities, but the Trustee shall not be required to make any such amortization and shall incur no liability if the Trustee determines that no sinking fund shall be established for amortization of premiums. In the case of securities that are payable at maturity without interest, from time to time there may be transferred from principal to income a pro rata part of the discount or difference between the purchase price and the amount payable at maturity.

## ARTICLE SEVENTH

## Accounting Obligations

7.1. Accountings: Any Trustee at any time acting hereunder may at any time and from time to time render, to such person or persons eligible to receive income from any trust hereunder as shall be of full age and competent at the time when such account is rendered (hereinafter sometimes referred to as the "Competent Beneficiaries"), an account of the acts and transactions of such Trustee with respect to the income and principal of such trust, from the date of the erection of such trust are from the date of the last previous account of such Trustee, as the case may be; and the Competent Beneficiaries shall have full power and authority on behalf of all persons interested in such trust finally to settle and adjust such account; and upon such account being settled and adjusted to the satisfaction of the Competent Beneficiaries, it shall be binding and

conclusive upon and every person (whether or not then living or then ascertainable) who shall then or thereafter be or become interested in either the income or the principal of such trust, with like effect as a judgment of a court having jurisdiction judicially settling such account in an action in which such Trustee and all persons having or claiming any interest in such trust were parties; and the approval by the Competent Beneficiaries of such account shall constitute a full discharge and release of such Trustee and of the estate of any deceased Trustee for whom such account is rendered, from all further liability, responsibility and accountability for or with respect to the acts and transactions of such Trustee as set forth in said account, as to both income and principal of such trust.

7.2. Judicial Accountings. Nothing contained in this Article shall preclude any Trustee from having an account judicially settled or from filing periodic accounts if such Trustee shall deem such settlement or such filing advisable.

7.3. Disability. If, in any accounting proceeding or in any non-judicial settlement of the Trustee's account, any Party to such proceeding or settlement shall be a person under a disability, service of process upon such person in such proceeding or signature upon such settlement by such person shall not be required if there is another person, not under a disability, who is a party to the proceeding or settlement and who has the same interest as the person under a disability.

## ARTICLE EIGHTH

Appointment of Successor Trustees and Co-Trustees

8.1. Successor Trustees. The Settlor shall have the power during his lifetime to appoint successor Trustees to fill vacancies hereunder. If at any time and for any reason WILLIAM B. MATTESON shall cease to act as a Trustee hereunder, and the settlor shall have failed to appoint a successor Trustee within ninety (90) days of the event creating the vacancy, then THEODORE A. KURZ shall become the successor Trustee. Subject to the foregoing, the last person acting as Trustee hereunder shall have the power to designate one or more successor Trustees hereunder.

8.2. Co-Trustee. Any individual Trustee who shall be acting alone shall have the power to appoint a co-Trustee to act with him or her.

8.3. Designation of Trustees; Permissible Trustees. Any designation of Trustees pursuant to this Article shall be made by a duly acknowledged instrument in writing designating one or more persons or series of persons, either natural or corporate, other than the Settlor; provided, however, that there shall at all times be at least one Trustee who is not a current beneficiary of any trust under this Agreement and who is not a related or subordinate party as defined in Section 672(c) of the Internal Revenue Code (or such other statutory provisions as shall from time to time correspond thereto), including without limitation one of the following: the Settlor's Spouse; the Settlor's father, mother, a descendant of the Settlor, a sibling of the Settlor, an

employee of the Settlor, a corporation or any employee of a corporation in which the stock holdings of the Settlor or the trust are significant from the viewpoint of voting control, or a subordinate employee of a corporation in which the Settlor is an executive. Any such instrument of designation shall become effective according to its terms and shall be revocable by a similar instrument at any time before such designation shall become effective. In the event that the same person shall have executed more than one instrument designating Trustees, then the instrument that shall bear the most recent date and shall be unrevoked shall govern.

8.4. Resignation. Any Trustee may resign at any time and for any reason by a duly acknowledged Instrument in writing delivered to each other then acting Trustee, if any, and to such Trustee's successor, and filed with the records of the trust to which it relates.

8.5. No Bond. No Trustee at any time acting under this Agreement shall be required to give any bond or other security for the faithful performance of such Trustee's duties.

8.6. Compensation. No Trustee shall be entitled to compensation for acting as a Trustee unless the Settlor shall otherwise agree in writing. Following the death of the Settlor, each Trustee whose compensation shall not otherwise have been fixed by agreement with the Settlor shall be entitled to receive compensation as provided by the instrument appointing such Trustee, or if no compensation shall have been provided for by

the foregoing provisions of this section, each Trustee's compensation shall be the compensation to which a sole individual Trustee of an express trust shall be entitled under New York law in effect at the time such compensation is payable.

8.7. Self-Dealing Restrictions. No Trustee shall be entitled to (a) exercise any discretion to pay or apply income or principal to himself or herself, (b) exercise any discretion, unless limited by an ascertainable standard, to pay or apply income or principal to any other beneficiary of any trust under this Agreement in which such Trustee shall have a current beneficial interest, (c) make discretionary allocations of receipts or expenses as between principal and income of any trust under this Agreement in which such Trustee shall have a current beneficial interest, (d) exercise any discretion to pay or apply income or principal of any trust under this Agreement in discharge of any of his or her legal obligations; including obligations of support, or (e) make discretionary allocations of receipts or expenses as between principal and income in favor of any beneficiary of any trust under this Agreement to whom such Trustee has a legal obligation of support; provided, however, that the foregoing shall not prevent any other Trustee from making such payment, application or allocation.

## ARTICLE NINTH

### Income not Taxable to Settlor

Notwithstanding anything herein contained to the contrary, all of the powers granted to the Trustee hereunder shall be exercised solely in and in no event and under powers be exercised from any trust fund under this Agreement taxable to the Settlor pursuant to the applicable provisions of the Internal Revenue Code. If any of the provisions herein shall be found to violate Section 671, *et seq.*, of the Internal Revenue Code (or such other statutory provisions as shall from time to time correspond thereto), so as to cause the income of any trust under this Agreement to be taxable to the settlor, then said provisions shall not be operative, but shall be the eliminated and of no effect. In that event, however, all other provisions of this Agreement shall remain in full force and effect, and shall not be affected thereby.

## ARTICLE TENTH

### Amendments; Governing

This Agreement shall be irrevocable and unamendable by the Settlor. Subject to the Trustee's power to change the situs of the trust property of any trust hereunder, this Agreement and each trust hereunder shall be governed and construed in all respects according to the laws of the State of New York.

## ARTICLE ELEVENTH

### Additions to Trust Fund

The Settlor or any other person or an attorney-in-fact acting on behalf of the Settlor (or any other person) may at any time and from time to time increase the Trust Fund by delivering property to the Trustee, or by having the proceeds of insurance policies or other benefits made payable to the Trustee, or by bequest or devise by will. The duties and liabilities of the Trustee shall under no circumstances be substantially increased except with the Trustee's written consent.

## ARTICLE TWELFTH

### Spendthrift Protections

Neither the principal nor the income of any trust under this Agreement, so long as the same is held by the Trustee, shall be subject to assignment or any other anticipation by the beneficiary for whom the same is intended, nor to attachment, execution, garnishment, sequestration or other seizure under any legal, equitable or other process. If any portion of the principal or income of such trust should, because of any debt incurred by, or other claim against, any beneficiary of any such trust, or by reason of any sale, assignment, transfer, encumbrance, anticipation or other disposition made or attempted by such beneficiary, or by reason of any seizure, attachment, execution, writ or other process, become payable or likely to become payable to any person other than the beneficiary for whom the same is intended, than notwithstanding

anything to the contrary contained in this Agreement, the Trustee in the Trustee's discretion may pay or apply to or to the use of the Spouse of such beneficiary, such beneficiary's then living descendants, or any other relative of such beneficiary, in such shares and proportions, as the Trustee may, from time to time, deem advisable, the share of the principal or income of such trust which, but for the provisions of this Article, would be payable to such beneficiary. Such payment shall be a full discharge to the Trustee with respect thereto.

## ARTICLE THIRTEENTH

### Savings Clause

Notwithstanding anything to the contrary contained in this Agreement, if any trust hereunder shall not otherwise have terminated pursuant to the provisions of this Agreement, upon the expiration of twenty-one (21) years after the death of the last survivor of the Settlor, the Settlor's Spouse (if the Settlor's Spouse was living on the date of execution of this Agreement) and all of the Settlor's descendants who were living on the date of execution of this Agreement, the Trustee shall transfer, pay over and distribute the then principal of such trust to the Settlor's then living descendants, per stirpes.

## ARTICLE FOURTEENTH

### Definitions

14.1. Associates IV Limited Partnership. "Associates IV Limited Partnership" shall have the meaning provided in Section 1.3 of Article FIRST.

14.2. Descendants. Each reference herein to an individual's "child", "Children" and words of similar meaning shall include (i) non-marital children who are the legitimate children of such individual, as such term is defined in Section 4-1.2 of the New York Estates Powers and Trusts Laws or to such other statutory provisions as shall correspond thereto at the time any determination of such relationship shall be made (hereinafter "non-marital children") and (ii) adopted persons who were under the age of eighteen (18) at the time they were adopted by such individual and each reference to an individual's "issue", "descendant", "descendants" and words of similar meaning shall include (i) non-marital children and their descendants and (ii) adopted persons who were under the age of eighteen (18) at the time they were adopted and their descendants.

14.3. Internal Revenue Code. Each reference herein to the "Internal Revenue Code" or the "Code" shall be deemed to mean and refer either to the United States Internal Revenue Code of 1986, as amended, or to such other statutory provisions as shall correspond thereto.

14.4. Settlor. "Settlor" shall have the meaning provided in the first Paragraph of this Agreement.

14.5. Skip Person. As used herein, the term "skip person" shall mean and refer to such term as defined in Section 2613 of the Internal Revenue Code.

14.6. Spouse. Each reference herein to an individual's "Spouse" shall mean and refer to the person who is married to and living with such individual at the time or times that any determination of such relationship shall be made, or who shall have been married to and living with such individual at the time of such individual's death; provided, however, that a person who is married to an individual shall be deemed to be living with such individual during any period of temporary physical separation that is unrelated to marital disharmony.

14.7 Trustee. Except as otherwise specifically provided in this Agreement, the term "Trustee" wherever used herein, shall mean and refer to the Trustee or Trustees at the time acting under this Agreement, and except as otherwise specifically provided in this Agreement, the powers, privileges and immunities and the discretions granted herein shall attach to the office of Trustee and shall continue as long as any assets are held in trust under this Agreement and until the final distribution thereof.

14.8. Trust Fund. "Trust Fund" shall have the meaning provided in the second paragraph of this Agreement. Each of the Trust Fund and any share or

subshare held under this Agreement shall be a "trust" under this Agreement.

14.9. Will. Each reference herein to an individual's "Last Will and Testament" or "Will" shall be construed as referring to the will of such individual and any codicil or codicils thereto.

## ARTICLE FIFTEENTH

### Miscellaneous

15.1. Gender. Whenever necessary or appropriate, the use herein of any gender shall be deemed to include the other genders and the use herein of either the singular or the plural shall be deemed to include the other.

15.2. Headings. The Article and section headings contained in this Agreement are for convenience only and are not a part of this Agreement.

15.3. Date. This Agreement shall become effective as of the day and year first above written.

IN WITNESS WHEREOF, the Settlor and the Trustee have hereunto set their respective hands and seals as of the day and year first above written.

/s/ Joseph Lee Rice, III [L.S.]
Joseph Lee Rice, III, Settlor

/s/ William B. Matteson [L.S.]
William B. Matteson, Trustee

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

On this 30th day of December, 1992 before me personally came JOSEPH LEE RICE, III, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

/s/ Margaret Coro
Notary Public

[NOTARY STAMP]

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

On this 30th day of December, 1992, before me personally came WILLIAM B. MATTESON, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

/s/ Jane C. Nober
Notary Public

[NOTARY STAMP]

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SCHEDULE A

One hundred Thousand Dollars ($100,000)

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| **STATE OF NORTH CAROLINA** | **IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 12 CVS 8740** |
| **The Kimberley Rice Kaestner 1992 Trust,**<br>**Plaintiff,**<br>**v.**<br>**North Carolina Department of Revenue,**<br>**Defendant.** | **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** |

* * *

**EXHIBIT 1**

**Joseph Lee Rice, III Family 1992 Trust**
**EIN #[redacted]3609**
**Form IT-205 Amended**
**FYE 12/31/05**

**Explanation of Changes**

The Joseph Lee Rice, III Family 1992 Trust (the "Trust") was established on December 30, 1992 by Joseph Lee Rice, III, then a resident of the State of New York. Since 1995, the Trust has been administered solely by a trustee domiciled outside of the State of New York. The entire corpus of the Trust consists of intangible assets. During the tax year 2005, the Trust received a negligible amount of New York source income from certain of its investment assets. The return for the tax year 2005 is being amended to reflect that

the Trust was not required to file a New York resident fiduciary return for that year. Instead, this return now reports only the amount of New York source income, $2,165, received by the Trust in the period from January 1, 2005 through December 31, 2005.

Based on the doctrine established by *Mercantile-Safe Deposit and Trust Company* v. *Murphy*, 15 N.Y.2d 579, 203 N.E.2d 490, 255 N.Y.S.2d 96 (1964) and its progeny (as acknowledged by the New York Department of Taxation and Finance with the adoption of 20 NYCRR §105.23(c) (2003), and thereafter by the New York Legislature with New York Tax Law §605(b)(3)(D)), the Trust is not required to pay income tax on the non-New York source income collected from January 1, 2005 through December 31, 2005.

In the past, courts in New York and elsewhere have carefully examined whether a state's taxation of a trust satisfies the requirements of the Due Process Clause of the U.S. Constitution. Beginning with *Mercantile-Safe Deposit & Trust Co.* v. *Murphy*, 15 N.Y.2d 579, 203 N.E.2d 490, 255 N.Y.S.2d 96 (1964), New York courts have struck down resident taxation of trust based solely on the domicile of the donor or beneficiaries of the trust. We are aware of no court decision supporting the taxation of the Trust as resident (and therefore subjecting to New York income tax all of the worldwide income of the Trust) based on the Trust's indirect receipt of a negligible portion of its income from New York sources even though the Trust has no trustees or assets located in New York State.

Taxation of the Trust as a resident would violate the two requirements under the Due Process Clause for resident taxation of all the Trust's worldwide income. First, the Trust did not have sufficient contacts with New York from January 1, 2005 through December 31, 2005 to permit such taxation. The Trust's only contacts with the State in 2005 were the domicile of its donor at the time the Trust was created many years earlier and a negligible amount of income from intangible assets – both contacts that New York courts have held to be constitutionally insufficient to support taxation as a resident trust. The State did not provide any benefits to the Trust, much less benefits sufficient to support the resident taxation of all of the Trust's worldwide income.

Second, unless applied to the Trust's income in the manner reported in this amended return, the State's tax regime (and in particular, Tax Law §605(b)(3)(D)) would not provide for any apportionment to take into account the extent of the Trust's activities in the State. Under the Due Process Clause, a taxing jurisdiction may constitutionally tax an entity's income only in proportion to that entity's activities in that jurisdiction. The taxation of 100% of the Trust's worldwide income in 2005 – when only .092% (.00092) of such income was indirectly received from New York sources – would not in any way even attempt to correspond to the true value of the Trust's income derived indirectly from activities in New York. In fact, the tax paid on the original return was 131 times the amount of New York source income.

We urge the Department to avoid these constitutional difficulties by refunding the total payments made on account to date, consistent with the application of Tax Law §605(b)(3)(D) in a manner respectful of the requirements of the Due Process Clause.

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| NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE |
| WAKE COUNTY | SUPERIOR COURT DIVISION |

THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST,

Plaintiff,

v.

N. C. DEPARTMENT OF REVENUE,

Defendant.

No. 12-CvS-8740

DEPOSITION OF KIMBERLY RICE KAESTNER

TUESDAY, JUNE 24, 2014

Conference Room 3
Moore & Van Allen, PLLC
430 Davis Drive, Suite 500
Morrisville, North Carolina
1:00 p.m.

Volume 1 of 1

Pages 1 through 24

* * *

[6] Carolina, I went to UNC Chapel Hill and received a master's in education in school counseling.

Q What was your bachelor's in?

A History.

Q And did you work in the area of counseling at any time?

A No.

Q What's your date of birth? I apologize. I don't usually ask that, but it becomes relevant.

A No worries; June 2nd, 1969.

Q And what are the ages of your children?

A 8, 10, and 12.

Q Are you aware of what this lawsuit is about?

A Yes.

Q Can you explain what it concerns?

A Sure. Basically, if it –

Mr. Silver: Ms. Kaestner, I will caution you that any information you've received from me about the –

The Witness: (interposing) Uh-huh.

Mr. Silver: – lawsuit I consider as privileged.

The Witness: Uh-huh.

Mr. Silver: If you have a general understanding that predates or is apart from the information you acquired from me, please tell Ms. Vincent what you understand or know.

The Witness: Okay.

[7] Mr. Silver: I just want to be sure that – our conversations, as you know, are privileged, and I don't believe Ms. Vincent is intending to inquire into those.

The Witness: Okay.

A A trust that was set up for me is being – is owed taxes – supposedly owed taxes and paid those taxes, but David Bernstein as the trustee is questioning whether that was – whether that was valid and is therefore asking the state to pay back those taxes.

Q What do you know about the history of the trust?

A Not very much, not very much.

Q Do you know who created the trust?

A Yes. My father created the trust.

Q And do you know the purpose of creating that trust, what it was for?

A Yes, to – to give me money.

Q And also some of your siblings?

A Yes.

Q And what do you know about what has happened to that trust through the years?

A That – well, that trust was one large trust and for myself it is – it became two trusts. And when I turned 40, it was-to become in my ownership. That's about it.

Q Okay. You know David –

A (interposing) Uh-huh.

[8] Q – Bernstein –

A (interposing) Uh-huh.

Q – who is here? Did you know any of the earlier trustees?

A I – yes, knew of them, not – I knew that Mr. Madison, I believe it was Madison, was the original trustee, or one of the original trustees.

Q Did you personally have any interactions with Mr. Madison?

A No

Q Have you personally had interactions with Mr. Bernstein?

A Yes.

Q Were you asked about whether you wanted to receive the assets of the trust when you turned 40?

A Yes.

Q And who asked you that?

A I don't recall, or let me – let me restate that. I believe my father; my father.

Q And what was your response?

A We had several discussions, and I felt nervous about being given that sum. of money and unsure as to whether I would do a good job with that money.

Q So at the time of the discussions you were aware of the size of the trust, or at least your portion?

[9] A Yes.

Q Do you recall what the size was back then?

A Yes.

Q And what was it?

A When my father made me aware of the trust, he told me it was worth about $13 million.

And at what point was this that he made you aware of the trust?

A When I was 37.

Q So you weren't aware of it at the time it was formed?

A No.

Q And what was the culmination of your discussions on whether or not you would receive the assets?

A Can you ask me that a different way?

Q Sure; absolutely. The discussions that you had with your father on whether or not you would take the assets from the trust –

A (interposing) Uh-huh.

Q – what was the final decision, the final determination, about what you wanted to do?

A At that time it was to extend the trust.

Q And did you have discussions with anyone other than your father about that decision?

A Yes.

Q Who?

[10] A David.

Q Okay. And I'm certainly not intending to infringe on any attorney privilege, but what was his advice as the trustee?

Mr. Myrick: Well –

Mr. Silver: (interposing) Objection to form, and Ms. Kaestner, again, there were certain conversations you had with Mr. Bernstein and other members of his firm as counsel or attorneys for you.

As I understand Ms. Vincent's questions, she's asking to what extent did you have conversations with Mr. Bernstein regarding the trust that were not within the scope of that attorney-client relationship.

Mr. Myrick: And to put that a little bit differently, to the extent that David was giving you legal advice or advising your that would be privileged, and that would be something that I would ask that you not testify to.

The Witness: And I was just going to say I don't recall.

Ms. Vincent: Okay.

The Witness: That was pretty much my – my answer.

Mr. Bernstein: I'm happy to know how meaningful my words were back at the time.

By Ms. Vincent:

Q What information do you currently receive about the

* * *

[17] A – I didn't get any advice while it was still under David because he was running it. So it wasn't until we went to David and said we'd like to dissolve the trust that we gave it to our investment company, which is Keel Point.

And now we have the ability to, you know, give advice and have input. But when it was the structure of the trust that you were talking about, we didn't have any – you know, David made the investments David and Rocaton handled everything.

Q So were you able to provide David or Rocaton, the same time period, with input on the investments?

A I do not recall.

Q Did you ever have any concerns about whether the investments were socially responsible, again during that same time period of '06 to '012?

Mr. Myrick: Object to form.

Mr. Silver: Object – right, same objection.

Q You can still answer.

A Can you tell me what you mean by social? I'm sorry.

Q By socially responsible investments?

A Yes.

Q In other words, like were you – did you have any input on if you felt like some investment was maybe socially unacceptable to you, like it was in blood diamonds or something?

[18] A Uh-huh.

Q Did you have any input in that type of decision. making?

A I did not understand the investments enough to give any input.

Q Could you borrow money from the trust during that time period?

A We did borrow. I mean we got a loan.

Q Were there any limitations that you are aware of on being able to get a loan or not being able to get a loan from the trust?

A Can you rephrase that?

Q Yeah. I'm asking if there were any limitations on you being able to get a loan, from the trust.

A Well, it was very clear that David could say no. We requested a loan, and he said yes.

Q And do you remember the amount of that loan?

A $250,000.

Q Do you know if it's been paid back?

A Yes.

Q Yes, you know, or yes, it has been paid back, just to be clear.

A Yes, it was paid by the other trust that was set up at that time.

Q Was the loan used – what was it used for?

* * *

Case: 12CVS8740 Deponent: Kimberley Rice Kaestner
Date: 6/24/14

| Page | Line | Correction | Reason |
|---|---|---|---|
| 8 | 6 | change to "Matteson" | misspelled |
| 9 | 21 | Insert "Davids decision | Between was and to |
| 11 | 25 | change to "Plaintiff trust" | change |
| Whole | Document | change to "Kimberley" | Name misspelled |

_____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
WAKE COUNTY

---------- X

THE KIMBERLEY
RICE KAESTNER 1992
FAMILY TRUST,

Plaintiff,

– against – 12 CVS 8740

NORTH CAROLINA
DEPARTMENT OF REVENUE,

Defendant.

---------- X

VIDEOTAPED DEPOSITION OF DAVID H. BERNSTEIN, taken by Defendant, pursuant to Notice, at the offices of Debevoise & Plimpton LLP, 919 Third Avenue, New York, New York, on Friday, May 2, 2014, commencing at 9:02 a.m., before Chandra D. Brown, a Registered Professional Reporter and Notary Public within and for the State of New York.

* * *

[4] I want to ask you starting about the history of the plaintiff from the time the Joseph Lee Rice, III Family Trust was formed in 1992.

Can I have you just give me a brief overview?

A The Trust was formed by Joe Rice in 1992. Bill Matteson was the trustee at that time and did continue

for a number of years until I believe I became trustee in late 2005 or so.

I know that we've given you the documents. It's a lot of dates, so, obviously, happy to look at documents and walk you through those.

Q Can you tell me more about what has – has happened to the Trust over time in terms of – I know there's been splits, amendments, whatever. Can you give me that kind of overview of the plaintiff?

A Well that's – we're talking about over 20 years of history of the Trust. But in 2002, under the terms of the Trust, the Trust was split into three sub-trusts. One share for each of the – of the – of Mr. Rice's three [5] children.

In 2005, when I became trustee, one of the things I then did was I actually separated the trust into separate trusts. So Kimberley's trust was separated out.

But I'm sorry I'm not going to be able to give you very specific dates. It would help me much more, obviously, in walking you through those amendments, all of which we've provided to you, if you show them to me, and I can walk you through what each of them were.

Q Okay.

When you separated, what you referred to as separated the Trust in 2005, can you explain to me the difference between having split them in 2002 and what happened in 2005?

A Well, I'm not a – I'm not a trust and estate lawyer. My understanding – and believe it was 2006 when I actually split the trusts. Again, I know you have those documents.

My understanding is under the terms of the Trust in 2002, it was the 10-year anniversary of the Trust, and per its terms, the Trust was [6] split into separate shares. When I then physically did that for the administrative convenience of having three different trusts that was in 2006. But the – as I understand it, the legal impact was the same. It really was just confirming what had been done by operation of the Trust itself in 2002.

Q Was there previously – was the accounting being done differently or anything different in the administration of the Trust between the time that it was just being split versus separately administered?

A There had not been an accounting previously. So one of the things that I did when I became trustee was ask that an accounting be done, and it was in the process of the accounting that we split the trusts. Or at least in the process of preparing accounting, we decided to do the split of trusts. That would help with the administrative convenience of the operation of three different trusts.

And I believe we've turned the accounting over to you and it's a pretty lengthy document.

* * *

[8] split the trusts after 2006, I did make some different investment decisions for the three trusts because the beneficiaries are in three very different places in their lives, and I didn't believe that the investment philosophy for all three trusts needed to be the same. One of Mr. Rice's children for example, is much younger and so has a very different investment time frame.

Q What – your relationship, you've been the trustee for the Trust since '05? I believe the date is 12/21/05.

A Yes. That sounds right to me.

Q Are you the attorney for the Trust?

A My law firm is the attorney for the Trust and I do – and I do provide legal advice to them as well. So, yes, I have – I have served as attorney for – in some respects.

Q Are you an officer for some of the parts of the Trust?

A I'm the trustee for the Trust. The Trust doesn't have any officers.

Q The Trust is a shareholder in some corporations. Are you an officer of those

* * *

[10] I probably was misremembering. It may have been – it may be a different entity. And I think the accounting will probably have all of these laid out.

Q Was there – was there a blocker corporation formed?

A I don't believe that was the legal name for it, but I think that – I think that the purpose of one of these entities dealt with a mechanism for protecting the – certain assets from taxation in the State of New York.

Q Are the holdings of the Trust all intangibles?

A I'm not sure. that do you mean by intangibles, I'm sorry?

Q All stocks, bonds, investment instruments.

A Yes. Those are among the holdings of the Trust.

Q Does the Trust hold real property?

A No, not to my knowledge. No, it does not hold real property.

Q Are you aware of any other assets that are – what would be called legally tangible assets?

* * *

[16] the power to make amendments along – including the one I did do where I divided the Trust. And let me just continue on.

Then on the top of Page 16, subparagraph (p) gives me the right to divide property into two or more separate trusts and that – that also, of course, is what I did when I divided the trusts in 2006.

Subparagraph (l) also references my power to allocate property to other trusts.

Subparagraph (r) gives me the power to take any other acts and to exercise all rights and privileges, even if not specifically mentioned here, as if I'm the absolute owner thereof, and I think this gives me the power to do further acts that are permitted under New York law. And my understanding was that New York law gives me the ability to make amendments even beyond the powers that are specified in the document.

Q All right. I appreciate that.

While we're on this document there where you read at the end of powers on Page 16, it talks about in 5.3 at the end of that paragraph

* * *

[38] page?

MR. MYRICK: Sure, I have no objection to that.

I don't have it with me in this room. I'll have to get it and we'll have to come back to it.

MS. VINCENT: We'll come back to it then. Thank you, though.

MR. MYRICK: Just happy to do anything I can to get it right.

A While – we can check this, but I will say that my – my best guess, I think I'm not supposed to guessing in a deposition, but my best guess is that it is a

reference to the Kimberley Rice Kessler [sic] 1992 Family Trust. And when we have a chance to look at the accounting, we'll try to put it in context and see if we can confirm that for you.

Q Thank you. Thank you

When Ms. Kaestner turned 40 on June 2nd of 2009, were all the assets delivered to her?

A They were not.

Q And why not?

A I exercised my discretion before she [39] turned 40 to pour the assets into a new trust. That did not include as a provision distribution of assets at age 40.

Q And what was the name of the new trust?

A I will not get this fully correct but it had the date 2009 in it. So it may – it was a Kimberley Rice Kaestner Trust, and it may have been the Kimberley Rice Kaestner 2009 Trust, but I'm going from memory there since I don't have the documents in front of me.

Q Was the '07 Special Asset Trust the only special asset trust that was made in connection with the Kimberley Rice Kaestner Trust, the plaintiff?

A I'm not a hundred percent certain of this, but my recollection is that I created a 2009 Special Asset Trust at the same time that I created the 2009 Family Trust or Kimberley Kaestner Trust. Those aren't the formal names of the trusts, but that's my best

recollection. And it was for the same purpose. It was because I exercised my discretion not to distribute the assets to Ms. Kaestner at the time when she was going to reach the age of 40.

* * *

[41] clear for the record.

BY MS. VINCENT:

Q So in terms of you having exercised your discretion, was that being referenced as the Trust being extended?

A Yes. We've used that reference internally in discussing what we were going – what I was doing with that pour-over.

Q Was this – these pour-overs, was this essentially what is often referenced as decanting the Trust?

A I believe that's correct.

Q Going back to blocker corporations, why was the Trust interested in a blocker corporation?

MR. MYRICK: Just to be clear, when you used the term "blocker corporation," that was your term.

MS. VINCENT: Right.

MR. MYRICK: Not the witness'.

A We – so we created Rice Family Investors, (KER), Inc. to hold certain assets. And the Rice Family Investors (KER), Inc. entity held a number of limited

partnership investments and [42] that was – that entity was owned by the Kimberley Rice Kaestner 2007 Special Asset Trust. That Trust was a grantor trust and it was created for the purpose of having all of the income from those assets – all of the income from those assets was reported on Mr. Rice's tax returns because he was the settlor.

And so the goal here was to increase the value of the Trust by not having the Trust have to pay its on taxes but by having Mr. Rice actually pay the taxes. And as I understand it, the way the grantor trust works, even though he was paying the taxes, that was not deemed a further gift to the Trust. And so it was way of increasing the assets in the Trust by not having the Trust have to pay its taxes but instead Mr. Rice paid the taxes.

Is that clear and is that answering your question?

Q That does answer my question. Thank you.

I want to ask you about the states in which tax returns have been filed. In terms of the plaintiff –

[43] A Yes.

Q – what states have tax returns been filed in?

A New York and North Carolina. And let me just think for a moment. I believe that – I think that some of the limited partnership investments there – may have filed tax returns for all of the limited partners in other states. This would probably be reflected on our tax returns if that's the case. But my – actually, you

know what, let me just take that back. Let me take that back. That's not correct.

The plaintiff – the plaintiff filed tax returns only in New York and North Carolina. I'm thinking of a different trust for Mr. Rice.

Q It looks like this was taken from one of the invoices to the Trust, they paid corporate tax in Connecticut in '07.

A Can you show me the document that you're looking at and I'll be happy to –

Q I'm going to have to actually search. I did not notate what that was. It may have been corporate tax for Rice Family Trust Investors.

* * *

[48] Q And what was the due date on the note?

A It was a open credit facility. There was no particular due date that I recall. There probably was a very far outside date, but, I'm sorry, I don't recall the due date off the top of my head.

Q So the interest rate set at the lowest rate that the IRS would allow?

A Yes, I believe that's correct.

Q And when was that loan made?

A I'm not going to remember with specificity but it was probably – it was probably in 2008 or 2009.

Q The loan to Ms. Kaestner?

A The loan to Ms. Kaestner. Ms. Kaestner and her husband wanted to invest in vanilla and asked me if they could have a loan so that they could make that investment. And they needed it for a short time until they could raise the funds on their own. So I agreed to loan them the money for their vanilla investment.

I never did follow up to ask them how that went, but while I was preparing for the deposition that question did come to my mind.

[49] Q When approximately was that loan?

A I think it may have been 2007 or 2008. That's my best recollection.

Q And what were the terms?

A I charged them a low interest rate. I think the lowest that the IRS would allow. And my recollection is that it was repaid within about six months or so.

Q Was that also open credit?

A What do you mean by that? I'm sorry.

Q You had referenced open credit on the special asset trust.

A No. No. This was a one-time – this was not an open credit facility.

Q Did it have a specific due date?

A I don't recall off the top of my head, but I'm sure that every promissory note – I'm pretty sure that

every promissory note has an outside due date, so I have to believe the answer is yes.

Q Or it could have been just due upon call?

A I don't recall. I would have to go back and look at the promissory note.

Q All right.

* * *

[52] vanilla.

So would – this entry, what does that mean, occurred on May 29th?

A The – I – the trust – the Kimberley Rice Kaestner 1992 Family Trust had a promissory note from Ms. Rice or Ms. Kaestner, I'm not sure why they refer to her as Kimberley Rice in the accounting, perhaps that's what was – on the promissory not [sic].

In any event, the Kimberley Rice Kaestner 1992 Family Trust had a promissory note and it was among the assets that I poured into the 2009 Trust. And that probably helps me recall that at least as of May 29, 2009 that note had not yet been paid. But I seem to recall it was paid relatively promptly. It has been paid off, obviously.

Q And this accounting would just be accounting. The face value wouldn't be including the interest?

A This just shows the face value. This doesn't show the interest. That's correct. If you'll help me with

the reference to par, what is that indicating, 250,000 par?

* * *

[68] reviewing with Rocaton, this is a meeting that I had with the three Rocaton individuals identified. We were reviewing the performance of the Trust in 2007. We were discussing some issues that arose with one of our investments, Partech. And then, as you can see, at the bottom of agenda we discussed Rocatan's fees and we discussed changing the custodian. The custodian of the Trust at the time had been State Street Bank.

Q So the participants in this meeting were limited to persons from your firm and persons from Rocaton?

A Just me. Me and the three Rocaton people.

And I would need to look at my calendar entries to see whether I met with them here in New York or – their offices are in Connecticut near my home and so I would frequently meet with Rocaton in Connecticut.

Q That's fine.

A You don't care. Then I won't look.

Q Okay. Thank you.

Have you had requests by the beneficiaries, or let's say by Mr. or

* * *

[70] I had absolutely no interest in it. And that was in the context of them deciding to invest in it themselves and that lead to the loan that was already discussed.

(Whereupon, the aforementioned document Bates stamped KRK0003667, was marked as Bernstein Exhibit 7 for identification as of this date by the reporter.)

BY MS. VINCENT:

Q I've handed you what's been marked Exhibit Number 7. Its KRK3667.

A Yes.

Q If you will look at that note.

Is this referencing the presentation that you've been speaking. to that happened on July 23 of '07?

A Yes. In fact, the next page of the Bates record is the actual presentation. So if you turned to 3668, you would have seen the presentation of slides.

Q In the second paragraph of this exhibit, it talks about illustrate recommended spending levels from the Trust.

Can you tell me what that's referring to?

[71] A Well, why don't I look at the document again.

Yes, I can.

So we were introducing Mrs. Kaestner for the first time, really, to details about the Trust, including the

size of the Trust, which was a pretty substantial asset. And among other things, Rocaton talked about the importance of sustaining trust assets and how investments of this size, it they are untapped, can grow quite substantially. And then offered some alternative projections, if Ms. Kaestner showed some interest, and if, of course, in my discretion would have been amenable to it in getting income from the Trust.

Rocaton put together a model that would show, based on certain investment return projections, if you wanted to remove funds from the Trust each year, what would that do to the Trust, how would the Trust grow, when would the Trust end, for example. So that is the projections that were referenced in his e-mail.

Q So this would be projections if she decided to – she wanted to request money from

* * *

[73] as an important asset to be preserved and maintained.

Q And did Ms. Kaestner indicate at or after that meeting what her preferences were?

A She indicated that – well, she was – the answer is yes. I mean, of course, she was quite pleased to hear about the asset, She and her husband told me that they intended to use a very substantial chunk [sic] this for charitable endeavors. They are very active it Durham Cares and in their church in. Durham, and I know that they are very excited about what they would be able to do with charitable giving, and this of course,

is an amazing asset that will allow them to do much more than they are doing on their own.

But she did tell me that she had no interest in taking advantage of the spending projections, the spending model. They were not looking for distributions of income from the Trust. Indeed Ms. Kaestner's husband is quite a successful businessman and this is a very nice asset for them to have, but they didn't have any need for income.

* * *

[87] this, please destroy them.

THE WITNESS: What was the question again? Could you read that back for me, please?

(Whereupon the requested question was read back by the Court Reporter.)

A I'm sure I did.

Q Do you recall the nature of your response?

A Generally that I didn't think – well, that I didn't think, well two things: This was during the market crash of 2008. And so I believe I told the Kaestners that, of course, the Trust was taking a hit as were almost all investments, but that we were well-diversified and that we were not, the Trust assets were not down nearly as much as the general market, thanks to our diversification. And I told them that I did not think it was appropriate to do regular reporting.

Q And so the information they have on the status of the assets has not been regular in any way since this request in '08?

A That's correct.

I didn't want to get into having lengthy discussions with the Kaestners about the

* * *

[89] BY MS. VINCENT:

Q How often have the Kaestners come to New York to meet with you?

A That would be in my calendar records again. Quite infrequently.

So we've already discussed the July 23, 2007 meeting. And then I met on October 30, 2008.

Q That meeting was here in New York?

A It was on this floor, Conference Room 35J. Just down the hall.

Q And what was the content of that meeting?

A I believe that was actually the meeting when I was responding to the e-mail you showed me, to provide them or to provide Mr. Kaestner, I think it was only that he was in New York at that time, with a update on how the Trust was doing through the market turmoil of 2008.

Q And you don't recall any other meetings with them in New York City?

A I do not.

Q Have you ever gone to North Carolina to meet with them?

A I have not.

* * *

[93] *** ERRATA SHEET ***

NAME OF CASE: THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST vs. NORTH CAROLINA DEPARTMENT OF REVENUE

DATE OF DEPOSITION: 5/2/14

NAME OF WITNESS: David H. Bernstein

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

Page 5 Line 3 Reason 1
From 2005 to 2006

Page 5 Line 5 Reason 1
From trusts to accounts
Page 5 Line 15 Reason 1
From 2005 to 2006

Page 5 Line 17 Reason 1
From 2005 to 2006
Page 5 Line 21 Reason 1
From _____ to after trusts – add: into separate accounts

Page 6 Line 4 Reason 1
From trusts to accounts
Page 6 Line 18 Reason 1
From _____ to after trusts – add: shares into separate accounts
Page 6 Line 19 Reason 1
From _____ to after preparing – add: the
Page 6 Line 20 Reason 1
From do the split of to split the



[ERRATA SHEET CONT'D] *** ERRATA SHEET ***

NAME OF CASE: THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST vs. NORTH CAROLINA DEPARTMENT OF REVENUE

DATE OF DEPOSITION: 5/2/14

NAME OF WITNESS: David H. Bernstein

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

Page 6 Line 21 Reason 1
From _____ to after trusts – add: shares into separate accounts

| | | |
|---|---|---|
| Page 7 | Line 23 | Reason 1 |
| From | | to after Trust – add: shares into separate accounts |
| Page 8 | Line 2 | Reason 1 |
| From after | | to shares into separate accounts in |
| Page 12 | Line 14 | Reason 1 |
| From trusts | | to accounts. |
| Page 16 | Line 9 | Reason 1 |
| From 2006 | | to 2007 |
| Page 18 | Line 3 | Reason 1 |
| From trusts | | to accounts |
| Page 19 | Line 21 | Reason 1 |
| From in 2006 | | to from 2007 |
| Page 20 | Line 15 | Reason 1 |
| From | | to add a period (.) after Trust |
| Page 20 | Line 16 | Reason 1 |
| From | | to delete line 16 |

[ERRATA SHEET CONT'D] *** ERRATA SHEET ***

NAME OF CASE: THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST vs. NORTH CAROLINA DEPARTMENT OF REVENUE

DATE OF DEPOSITION: 5/2/14

NAME OF WITNESS: David H. Bernstein

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

| | | |
|---|---|---|
| Page 20 | Line 17 | Reason 1 |
| From | | to delete: the – and in – I'm sorry. |
| Page 20 | Line 18 | Reason 1 |
| From | | delete: I misrecalled it being 2006. |
| Page 20 | Line 23 | Reason 1 |
| From | | to delete: No. |
| Page 23 | Line 21 | Reason 1 |
| From | | to delete everything after 2006. |
| Page 23 | Line 22 | Reason 1 |
| From document. But in | | to In |
| Page 23 | Line 23 | Reason 1 |
| From | | to delete: I did an amendment where |
| Page 23 | Line 24 | Reason 1 |
| From | | to after trusts add: share into separate accounts |

Page 22 Line 25 Reason 1
From trust to account
Page 24 Line 21 Reason 1
From I didn't – I to In 2006,
documented that in



[ERRATA SHEET CONT'D] *** ERRATA SHEET ***

NAME OF CASE: THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST vs. NORTH CAROLINA DEPARTMENT OF REVENUE

DATE OF DEPOSITION: 5/2/14

NAME OF WITNESS: David H. Bernstein

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

Page 24 Line 22 Reason 1
From to delete line 22

Page 24 Line 23 Reason 1
From to delete line 23
Page 24 Line 24 Reason 1
From to delete: that was –
that was when

Page 24 Line 25 Reason 1
From to after split add: into
separate accounts
Page 25 Line 8 Reason 1
From shares to accounts

Page 25 Line 18 Reason 1
From document to separation
Page 25 Line 25 Reason 1
From Dubilier to Dubilier & Rice

Page 26 Line 16 Reason 1
From _____ to delete: If you had that
Page 26 Line 17-19 Reason 1
From _____ to delete lines 17 – 19



[ERRATA SHEET CONT'D] *** ERRATA SHEET ***

NAME OF CASE: THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST vs. NORTH CAROLINA DEPARTMENT OF REVENUE

DATE OF DEPOSITION: 5/2/14

NAME OF WITNESS: David H. Bernstein

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

Page 27 Line 5 Reason 1
From _____ to delete &

Page 27 Line 6 Reason 1
From Dubilier to Dubilier & Rice
Page 27 Line 6 Reason 1
From for to is one of its

Page 27 Line 7 Reason 1
From limited partnership to Limited Partnerships

| | | |
|---|---|---|
| Page 28 | Line 4-5 | Reason 1 |
| From | | to delete lines 4 and 5 |
| Page 28 | Line 6 | Reason 1 |
| From amendment | | to separation |
| Page 35 | Line 3 | Reason 1 |
| From LIR | | to LAR |
| Page 38 | Line 16 | Reason 1 |
| From Kessler | | to Kaestner |
| Page 39 | Line 6-11 | Reason 1 |
| From delete existing text | | to "The KER Family Trust" |
| Page 39 | Line 19-20 | Reason 1 |
| From 2009 | | to KER and delete "or Kimberley Kaestner Trust |
| Page 49 | Line 3-4 | Reason 1 |
| From I think it may have been in 2007 or 2008 | | to January, 2009 and delete Line 4 |
| Page 51 | Line 14-16 | Reason 1 |
| From | | to after Trust on L 14; delete next sentence |
| Page 52 | Line 10 | Reason 1 |
| From not | | to note |

[ERRATA SHEET CONT'D] *** ERRATA SHEET ***

NAME OF CASE: THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST vs. NORTH CAROLINA DEPARTMENT OF REVENUE

DATE OF DEPOSITION: 5/2/14

NAME OF WITNESS: David H. Bernstein

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

Page 59 Line 9/ Reason 1
From shares to accounts

Page 60 Line 20 Reason 1
From I'm sure to I suspect
Page 60 Line 22 Reason 1
From would to could

Page 61 Line 14 Reason 1
From an appropriate to inappropriate
Page 62 Line 5 Reason 1
From _____ to add: during the periods at issue

Page 64 Line 7 Reason 1
From ours to our production
Page 66 Line 4 Reason 1
From file to final

Page 67 Line 19 Reason 1
From Green Spring to Greenspring

Page 70 Line 23 Reason 1
From _____ to delete: illustrate



[ERRATA SHEET CONT'D] *** ERRATA SHEET ***

NAME OF CASE: THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST vs. NORTH CAROLINA DEPARTMENT OF REVENUE

DATE OF DEPOSITION: 5/2/14

NAME OF WITNESS: David H. Bernstein

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

Page 73 Line 11 Reason 1
From it to in

Page 79 Line 7 Reason 1
From 2009 to June 2, 2009

Page 81 Line 23 Reason 1
From them. to them during the period at issue.

Page 83 Line 20 Reason 1
From _____ to after but add: during the period at issue

Page 84 Line 3 Reason 1
From _____ to add: during the period at issue

| | | |
|---|---|---|
| Page 87 | Line 23 | Reason 1 |
| From | | to add: during the period at issue |
| Page 88 | Line 8 | Reason 1 |
| From | | to delete: even |
| Page 88 | Line 9 | Reason 1 |
| From after | | to during |
| Page 88 | Line 9 | Reason 1 |
| From | | to add after period: at issue |
| Page | Line | Reason |
| From | | to |

/s/ David H. Bernstein
David H. Bernstein

| | |
|---|---|
| STATE OF NORTH CAROLINA<br>COUNTY OF WAKE | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>12-CVS-8740 |
| THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST,<br>Plaintiff,<br>v.<br>NORTH CAROLINA DEPARTMENT OF REVENUE,<br>Defendant. | **RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT and REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**<br>(Filed Oct. 6, 2014) |

* * *

| | |
|---|---|
| NORTH CAROLINA<br>WAKE COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION |
| THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST,<br>Plaintiff,<br>v.<br>N. C. DEPARTMENT OF REVENUE,<br>Defendant. | No. 12-CvS-8740 |

DEPOSITION OF KIMBERLY RICE KAESTNER

TUESDAY, JUNE 24, 2014

Conference Room 3
Moore & Van Allen, PLLC
430 Davis Drive, Suite 500
Morrisville, North Carolina
1:00 p.m.

Volume 1 of 1

Pages 1 through 24

* * *

[9] A Yes.

Q Do you recall what the size was back then?

A Yes.

Q And what was it?

A When my father made me aware of the trust, he told me it was worth about $13 million.

Q And at what point was this that he made you aware of the trust?

A When I was 37.

Q So you weren't aware of it at the time it was formed?

A No.

Q And what was the culmination of your discussions on whether or not you would receive the assets?

A Can you ask me that a different way?

Q Sure; absolutely. The discussions that you had with your father on whether or not you would take the assets from the trust –

A (interposing) Uh-huh.

Q – what was the final decision, the final determination, about what you wanted to do?

A At that time it was to extend the trust.

Q And did you have discussions with anyone other than your father about that decision?

A Yes.

Q Who?

* * *

[12] Q And that would be the successor trust that came into being when the assets were rolled over, poured over?

A Well, my understanding is that there were two trusts along, like the plaintiff trust and another trust.

Q Okay. And then what is your understanding of what happened thereafter?

A Well, when it was extended, when it went beyond – it was extended, and I really don't recall what it became after that.

Q This is extended beyond your having reached the age of 40?

A Yes.

Q And so is the one that was extended beyond the age of 40 – is that the one that you are testifying you believe was dissolved?

A Everything was dissolved. It – yeah, everything was dissolved, no longer is in trust form.

Q So none of those assets you believe are currently in a trust?

A Well, so now we have those assets managed by our own management firm, and some of it – I correct myself. Some of it is still in trust form as originally invested by David. I don't see it as a trust just because the formal – the way it was formally established is no longer in existence, and we have our own management company now taking care of it.

[13] Q And what is that management company?

A It's called Keel Point, and they're in Virginia.

Q For what period of time from the time you became aware of the trust until trust dissolved, you believe it dissolved, what was that time period? How many years, if you know, or months or –

A That I became aware of it to the time it –

Q (interposing) Uh-huh.

A – it was dissolved or –

Q (interposing) Uh-huh.

A – came under –

Q (interposing) Yes.

A – my ownership; so 2007 to 2012.

Q Okay. So during that time period, from 2007 to –

A (interposing) 2006 to 2012.

Q Okay. From 2006 to 2012 –

A (interposing) I was made aware of it in 2006 and dissolved it in 2012.

Q And from that point that you became aware of it –

Mr. Myrick: Can I clarify what "it" is?

Ms. Vincent: The plaintiff trust.

Mr. Myrick: Okay, okay.

By Ms. Vincent:

Q From the time you became aware of the plaintiff trust –

* * *

Case: 12CVS8740 Deponent: Kimberley Rice Kaestner
Date: 6/24/14

| Page | Line | Correction | Reason |
|---|---|---|---|
| 8 | 6 | change to "Matteson" | misspelled |
| 9 | 21 | Insert "Davids decision | Between was and to |
| 11 | 25 | change to "Plaintiff trust" | change |
| Whole | Document | change to "Kimberley" | Name misspelled |

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
WAKE COUNTY

---------- X

THE KIMBERLEY
RICE KAESTNER 1992
FAMILY TRUST,

Plaintiff,

– against –

12 CVS 8740

NORTH CAROLINA
DEPARTMENT OF REVENUE,

Defendant.

---------- X

VIDEOTAPED DEPOSITION OF DAVID H. BERNSTEIN, taken by Defendant, pursuant to Notice, at the offices of Debevoise & Plimpton LLP, 919 Third Avenue, New York, New York, on Friday, May 2, 2014, commencing at 9:02 a.m., before Chandra D. Brown, a

Registered Professional Reporter and Notary Public within and for the State of New York.

* * *

[40] Q So again, not using the full formal names, but there was essentially an '07 Special Asset Trust and an '09 Special Asset Trust?

A I believe that's correct.

Q And was – in each case it was essentially a pour-over? Like the 2009 Special Asset Trust, was that a pour-over of the 2007 Special Asset Trust?

A Yes, it was.

Q And the Kimberley Rice Kaestner Trust that was formed in the document that I believe is Exhibit 1, was that essentially all poured over into this new 2009 Trust?

A Yes, it was.

MR. MYRICK: You're referring to the special asset trust?

THE WITNESS: No. I'm sorry. I understood that to be the family trust.

MS. VINCENT: No. I had asked about the special asset trust and I was asking about just the Kimberley Rice Kaestner, but there was a 2007 –

MR. MYRICK: All right. You changed gears there. So I just wanted to be sure that was

* * *

[74] Q Have they shown an interest in the investments being of a certain type, such as green investments or socially responsible investments?

A We did not. I made it very clear to them that I was going to use my discretion, and I really didn't engage in discussions with them about investment managers, and they did not express an interest in my doing those kinds of investments and I didn't raise the issue with them either.

(Whereupon, the aforementioned document Bates stamped KRK0004154, was marked as Bernstein Exhibit 8 for identification as of this date by the reporter.)

BY MS. VINCENT:

Q Handing you what's been marked as Exhibit 8, its KRK4154, where Mr. Thomas is asking about what motivates Ms. Kaestner.

Did you or have you since then made a determination as to what motivates Ms. Kaestner?

A So here Barry is asking me if she would be interested in socially responsible investment. [75] And as I mentioned, there was – that was not something that – I could tell you that I don't even recall if we specifically asked her that question. It's possible. But, no, I don't – I don't have a – I don't think I know what motivates Ms. Kaestner from the perspective of what kind of investments interested her.

Q Do you believe that – is it Rocaton?

A Rocaton, yes, that's correct.

Q – that they have looked for investments that appeal to Ms. Kaestner?

A They have not. They looked for investments that appeal to me.

Q Why do you say that with such assurance?

A Because I've been – I have a very long history in investing, and I think that I have some sophistication in investing, and I've spoken with Rocaton a lot about my investment philosophy, and I let them know the types of investments that I was interested in. So I specifically directed them on the kinds of investments that I wanted for this Trust.

Q Are you aware that Mr. Kaestner is involved in various investment vehicles?

* * *

[79] Trust.

Q You're not aware of any issue that the Trust had in regard to a timing issue?

A The only timing issue that I think the Trust faced was the fact that if I didn't exercise my discretion prior to 2009 that the Trust assets would all be directed to Ms. Kaestner. And I'm going to be very careful here to try to avoid getting into privilege, but, as trustee, I told her that I thought it was inappropriate for the Trust to be distributed because the Trust provides very substantial creditor protection for her, and if these assets were in her own name, she would lose that creditor protection. And I did have conversations with

Ms. Kaestner about my intention to exercise my discretion to pour the Trust into a new trust that would not require me to distribute the assets to her at age 40.

That is a – to the extent the term "timing issue" covers that, that is certainly a topic that was on my mind. I don't know if that is – I don't know if that is what is referenced here, and I think that's the most I

* * *

[81] were going to bill for this work, because I know that we did not bill for a very substantial amount of the work that we did for Mr. Rice and for the trust.

We elected to write off and to heavily discount quite a lot of the work that we had done. And without seeing the full document, I don't know if this is an invoice that was actually sent or if this was an internal draft that we were working on before we decided what to bill. And I can't tell you who – if it was a bill, I can't tell you who it was billed to without seeing the cover page of bill itself.

Q Okay.

How often, and I apologize if you feel this is repetitive, but how often would you say that you ordinarily have communicated with the Kaestners?

A I believe I said infrequently, but I have given you my calendar records. It would tell you exactly every communication I've had with them.

Q So you believe that the –

A Excuse me. Well, every phone call or the

* * *

[83] would go months at a time without having any communications with them at all.

Q And in terms of accounting, not counting those three formal accountings but less formal accountings, just information on the status of the assets, how often would you say that occurs or has occurred?

A So, I mean, accounting, of course, is a term of art, which is what these binders are. If what you – I think what you're referring to is sort of, you know, how is the performance of Trust, and my view was that this was not something I wanted to share with them and so I did not regularly do that.

They had a report on the Trust investments in our 2007 meeting and I may have spoken with them, you know, very infrequently, maybe once a year, about how the Trust generally was doing, but it was not my practice to report to them the performance of the Trust on a regular basis.

Q Do you typically send them annual reports or quarterly reports that came from the investment vehicles that the Trust is involved [84] in?

A I did not.

(Whereupon, the aforementioned document Bates stamped KRK0004242, was marked as Bernstein Exhibit 10 for identification as of this date by the reporter.)

BY MS. VINCENT:

Q I've handed you what's been marked Exhibit 10. It's KRK4242.

A (Witness views document.)

Well, I think my counsel should have marked this as privileged personally. This is my seeking legal advice from Jonathan Rikoon.

THE WITNESS: And I will ask Tom to consider whether this should be privileged.

A But in any event –

MR. MYRICK: Wait. Before you answer any questions, let me just read it here.

Let's go off the record here. Let me confer with the witness about this document.

THE VIDEOGRAPHER: Time is 11:29 a.m. We are coming off the record.

(Whereupon, a short recess was taken.)

THE VIDEOGRAPHER: Time is 11:35 a.m. We

* * *

[88] investment decisions that I was making.

Q So in terms of getting the status of how the investment is doing, this is occurring how often?

A I probably gave them another report sometime in 2008, while the markets were in turmoil, but I can't

– I still think even after this period it was, you know, maybe once or twice a year at most.

Q In your opinion, do the Kaestners at this time have a reasonable idea of the size of their – of this asset?

MR. MYRICK: I'm going to object to the form of that question.

You can answer it.

THE WITNESS: Let me hear it again, please.

(Whereupon, the requested question was read back by the Court Reporter.)

A I'm not sure that they do.

MR. MYRICK: Same objection.

MS. VINCENT: I'm sorry?

MR. MYRICK: I just wanted to interject the objection after they read it back to him.

* * *

[ERRATA SHEET CONT'D] *** ERRATA SHEET ***

NAME OF CASE: THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST vs. NORTH CAROLINA DEPARTMENT OF REVENUE

DATE OF DEPOSITION: 5/2/14

NAME OF WITNESS: David H. Bernstein

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

| | | |
|---|---|---|
| Page 6 | Line 21 | Reason 1 |
| From | | to after trusts – add: shares into separate accounts |
| Page 7 | Line 23 | Reason 1 |
| From | | to after Trust – add: shares into separate accounts |
| Page 8 | Line 2 | Reason 1 |
| From after | | to shares into separate accounts in |
| Page 12 | Line 14 | Reason 1 |
| From trusts. | | to accounts. |
| Page 16 | Line 9 | Reason 1 |
| From 2006 | | to 2007 |
| Page 18 | Line 3 | Reason 1 |
| From trusts | | to trust's |
| Page 19 | Line 21 | Reason 1 |
| From in 2006 | | to from 2007 |
| Page 20 | Line 15 | Reason 1 |
| From | | to add a period (.) after trust |
| Page 20 | Line 16 | Reason 1 |
| From | | to delete line 16 |

* * *

| | |
|---|---|
| **STATE OF NORTH CAROLINA** | **IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION** |
| **WAKE COUNTY** | **12 CVS 8740** |
| **The Kimberley Rice Kaestner 1992 Trust,** Plaintiff, v. **North Carolina Department of Revenue,** Defendant. | **DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE AND REPLY TO MOTIONS FOR SUMMARY JUDGMENT** (Filed Oct. 21, 2014) |

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| | |
|---|---|
| NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE |
| WAKE COUNTY | SUPERIOR COURT DIVISION |
| THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST, Plaintiff, v. N. C. DEPARTMENT OF REVENUE, Defendant. | No. 12-CvS-8740 |

DEPOSITION OF KIMBERLY RICE KAESTNER

TUESDAY, JUNE 24, 2014

Conference Room 3
Moore & Van Allen, PLLC
430 Davis Drive, Suite 500
Morrisville, North Carolina
1:00 p.m.

Volume 1 of 1

Pages 1 through 24

* * *

[14] A (interposing) Uh-huh.

Q – What type of information did you receive regarding the trust?

A So David – I first off met David. And my father was concerned that I have an understanding as to, you know, what the trust looked like, how it was invested, and met with a company called Rocaton that was handling the investments for David to get a better understanding as to what it looked like, because my father felt I should just – knowing that I wouldn't feel comfortable with the whole thing, that I should just understand what it looked like.

Q And after gaining that initial understanding, did you continue to receive information about the trust going forward?

A Yes.

Q From David?

A Yes.

Q From Rocaton?

A Yes.

Q From anyone else?

A I don't recall.

Q How often would you receive information?

A I don't recall.

Q Did you receive any kind of annual accountings on the trust?

[15] A Can you tell me more of what you mean?

Q I'm wondering if on a yearly basis you received a statement or other documents that told you that the health of the trust was –

A (interposing) Yes.

Q – at that time.

A Yes.

Q And who were those from?

A David.

Q Did you ever have occasion to call Mr. Bernstein's office to inquire about the trust?

A I don't recall.

Q When you met David and met Rocaton, where was that?

A In New York City.

Q Was that in David's office?

A It was at Debevoise & Plimpton, yes.

Q Was there a presentation given regarding the trust?

A Yes.

Q Who gave the presentation?

A People from Rocaton.

Q Have there been other meetings regarding the trust?

A What do you – what do you mean?

Q Other meetings maybe where something was going to be explained or presented or even just a short meeting with someone where they're giving you information on the trust.

* * *

[20] A Again, when it was set up as a trust, my understanding was my husband could say something to David or could give advice to David, but David could take or leave that advice as trustee.

I don't recall if my husband actually did that. He may have wanted to. I don't recall any exact conversation that they had. But it was my understanding as trustee that that judgment was ultimately David's.

Q Do you yourself have what I would call investment knowledge similar to your husband's?

A No.

Ms. Vincent: I have no further questions.

Mr. Myrick: Okay. Let's – let me talk to my client for a minute.

Mr. Silver: We can go off the record, take a short break.

The Reporter: Off the record. 1:25 p.m.

(A brief recess was taken.)

The Reporter: On the record. 1:31 p.m.

CROSS-EXAMINATION 1:31 p.m.

By Mr. Myrick:

Q is it your understanding that the plaintiff trust still exists today?

A Yes.

Q Okay. And the reason I ask that is because earlier

* * *